S. Hrg. 101-24

AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 54

TO AMEND THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 WITH RESPECT TO THE WAIVER OF RIGHTS UNDER SUCH ACT WITHOUT SUPERVISION, AND FOR OTHER PURPOSES

MARCH 16, 1989

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AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989

THURSDAY, MARCH 16, 1989

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:25 a.m., in Room 628, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Jeffords.

Also present: Senator Heinz.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator **Metzenbaum**. The hearing will come to order. Today's hearing addresses proposed legislation aimed at ensuring that older workers are not coerced or manipulated into waiving their rights under Federal law.

For the past two years, I have been concerned that the Equal Employment Opportunity Commission and some Federal courts have permitted older workers to waive their rights under the Age Discrimination in Employment Act, sometimes known as ADEA, without appropriate protections or Federal supervision. My major concern has been that early retirees or employees participating in so-called "exit incentive" programs can be effectively forced to waive their right to file a claim by conditioning these incentive payments upon the signing of a waiver.

This pre-emptive waiver of rights occurs before any dispute has arisen and indeed before an employee is even aware of any pattern of discrimination. Such a waiver is both unfair and inconsistent with the intent of the ADEA. The worker is at a disadvantage.

S. 54, the Age Discrimination in Employment Waiver Protection Act, is an effort to eliminate unfair or abusive waiver practices. It is bipartisan legislation, with more than 20 co-sponsors, including five of the seven members of this subcommittee.

[The bill, S. 54, follows:]

II

101st CONGRESS
1st Session

S. 54

To amend the Age Discrimination in Employment Act of 1967 with respect to the waiver of rights under such Act without supervision, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 25 (legislative day, January 3), 1989

Mr. Metzenbaum (for himself, Mr. Heinz, Mr. Pryor, Mr. Kennedy, Ms. Mikulski, Mr. DeConcini, Mr. Shelby, Mr. Harkin, Mr. Kohl, Mr. Simon, Mr. Matsunaga, Mr. Adams, Mr. Pell, Mr. Burdick, Mr. Glenn, and Mr. Dodd) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

---

A BILL

To amend the Age Discrimination in Employment Act of 1967 with respect to the waiver of rights under such Act without supervision, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Age Discrimination in Employment Waiver Protection Act of 1989".

SEC. 2. WAIVER PROVISION.

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end thereof the following new subsection:

"(f)(1) An individual may not waive any right under this Act without the supervision of the Equal Employment Opportunity Commission or a court, except in settlement of a bona fide claim alleging age discrimination of a kind prohibited under section 4 or section 15 of this Act.

"(2) A settlement of a bona fide claim pursuant to paragraph (1) may occur only if the waiver is knowing and voluntary and only if—

"(A) a settlement agreement applicable to the bona fide claim is in writing and specifically refers to rights or claims arising under this Act;

"(B) the agreement does not waive rights or claims that may arise after the date the agreement is entered into;

"(C) the rights or claims are waived in exchange for consideration in addition to anything of value—

"(i) to which the individual already is entitled; or

"(ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program;

"(D) the individual is given a reasonable period of time in which to consider the agreement; and

"(E) the individual is advised in writing to consult with an attorney prior to entering into the agreement.

"(3) For the purpose of this subsection, the term 'bona fide claim' means—

"(A) a charge of age discrimination filed with the Equal Employment Opportunity Commission;

"(B) an action alleging age discrimination filed in court by the individual or the individual's representative; or

"(C) a specific allegation of age discrimination communicated in good faith and in writing by the individual or the individual's representative directly to the employer (including, where applicable, a Federal agency), employment agency, or labor organization or their representatives.".

SEC. 3. EFFECTIVE DATE.

(a) In General.—The amendments made by this Act shall take effect on the date of enactment of this Act.

(b) Rule on Waivers.—Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627.16(c) of title 29 of the Code of Federal Regulations shall have no force and effect.

○

Senator **Metzenbaum**. The bill consists of two basic principles. First, the legislation authorizes an older worker to waive his or her right to file a claim without EEOC or court supervision, but only if the individual has made a specific claim of age discrimination against an employer. In this dispute context, a waiver without Government involvement is permissible as part of a settlement agreement, provided that the employee is given certain due process protections.

Among the protections set forth in S. 54 are that the employee must have a reasonable period of time to consider the agreement; he or she must be advised in writing to consult with an attorney; and the agreement itself must be in writing and must refer expressly to the fact that ADEA rights are being waived. By specifying certain basic factors that must be present in order for a waiver to be valid, the bill resolves current confusion in the courts, and should reduce costly and time-consuming litigation concerning these ADEA waivers.

Secondly, the legislation provides that unsupervised waivers may not be used as a condition of participation in early retirement or other exit incentive programs. In this non-dispute context, where employees have no reason to be on guard to protect their rights, it is simply bad public policy to allow waivers without Federal supervision. Indeed, to allow waivers as a condition for exit incentive programs could effectively insulate these programs from judicial scrutiny even if they are blatantly discriminatory. Such a result is wholly at odds with the purposes of the ADEA.

As we will hear today, most employers do not seek to extract waivers when offering early retirement or other exit incentive programs. But the use of such unsupervised waivers has grown in recent years. Our bill is needed to clarify once and for all that unsupervised waivers are automatically invalid in these non-dispute situations.

At this morning's hearing, we will hear from the Chairman of the EEOC. We also will hear from the General Accounting Office, reporting on employer practices regarding the use of waivers. We will then hear from several employees describing their experiences with waivers—experiences that demonstrate vividly the need for this legislation. Finally, we will hear from a Chicago attorney who has represented both employees and employers in ADEA waiver cases, from the Older Women's League, and from representatives of the business community.

And of course we are privileged and pleased about the fact that we will first hear from the ranking member of this subcommittee, Senator Jeffords and thereafter, Senator Heinz, who has been a strong supporter of this legislation.

Senator Jeffords, you may proceed.

OPENING STATEMENT OF SENATOR JEFFORDS

Senator **Jeffords**. Thank you, Mr. Chairman. I am pleased to be with you here today at this hearing. This is an important hearing. The Congress has suspended the EEOC's rule on unsupervised releases for two years now and it is time to dispose of this matter. There are areas of common ground obviously. No one disagrees that a waiver must be knowing and voluntary and there may be some argument as to what that means exactly. And no one argues that a waiver obviously must be accompanied by a consideration or an employee should be informed of his or her rights, advised to consult a lawyer and given time to weigh that offer. And perhaps we can find some additional areas of common ground here today.

I think we have a very common rule and purpose here today, and that is to protect the rights of individuals. But there are some questions that I have about the bill which is proposed. That is why I am not one of the five mentioned. I believe it is important that we understand as to what exact procedure should be used to protect the rights of the individual, as to whether or not we will so overburden the EEOC by the bill that it will be counterproductive rather than productive as it compared with the EEOC's regulatory proposals with some modifications. So I am looking forward today, Mr. Chairman, and I am waiting to be convinced.

Senator METZENBAUM. Senator, I want you to know that there is a sixth spot—we have 22 spots, but we have agreed to work you in as number three or four, if you are ready to come on. We are holding a spot for you.

We are very pleased to hear first this morning from the Honorable John Heinz who for many years has been one of the leading advocates for older Americans in the United States Senate. He is past chairman of the Special Committee on Aging. He is currently the ranking minority member on that committee.

We have worked closely together on legislation to abolish mandatory retirement and I am pleased to work with him with this bill, as well as so many others. And I am pleased and proud that he is the first co-sponsor of S. 54. Happy to have you with us.

Senator Heinz.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, thank you very much for the very generous introduction and, Senator Jeffords, I hope that my testimony will persuade you to be our 23rd co-sponsor.

As the Chairman has noted, this is legislation that he and I, together with our co-sponsors introduced last year and again this year, and its purpose is to ensure that older workers are not coerced into waiving their rights under the law.

Mr. Chairman, as you know, in July of 1987, the EEOC attempted to issue final rules permitting employees to waive their rights under the ADEA in the absence of agency supervision. And these regulations would allow so-called unsupervised waivers as long as the employee knowingly and voluntarily agrees to the conditions of the early retirement incentive offer and to the use of the waiver.

When the EEOC issued these rules, I was one of those who objected. It seemed to me then, as it does today, that to enact a rule which would broadly exempt all employers and employees from ADEA protections could effectively strip workers of any protection from age discrimination. In other words, this is the way of gutting the law.

We acted in the Congress in October 1987, and again in June of 1988, to place a moratorium on the implementation of these rules. The last moratorium will expire at the end of this fiscal year, October 1st. I do not believe we should continue to deal with this problem by using the temporary solution of a Congressional moratorium.

Mr. Chairman, I hope we can pass our legislation S. 54 quickly so that we can stop permanently wholesale use of unsupervised waivers in early retirement incentive offers.

Let me take a moment to explain the issue. Businesses often require workers to sign, that is, waive away their rights to file an ADEA claim as a condition for receiving and accepting a financial package which is offered to the employee in exchange for his or her agreement by the employee to retire from the company. This waiver prevents the employee from later charging the company with age discrimination.

The problem is that the knowing and voluntary standard for the employee is without the meaning intended by Congress and expressed in the statute. It is highly unlikely and in most cases, Mr. Chairman, it is virtually impossible for these employees to know whether or not they or their fellow employees are being subjected to a pattern of age discrimination or not. And therefore, they cannot knowingly do anything.

The fact is, that as long as there is a financial incentive involved and as long as the worker cannot know how the overall offer is structured or what the overall patterns of the company are, the signing of the waiver in effect becomes coercive. I believe, it is certainly premature, and I will give you a case history.

The Hallas case comes to mind. Last year, a gentleman named Mr. Ronald Hallas, a constituent of mine, testified before the Aging Committee in the Senate, on his personal experience with waivers. When his employer, U.S. Steel, needed to reduce its work force, Mr. Hallas was asked to retire early and was faced with either receiving his health and pension retirement benefits, as long as he agreed to sign the waiver, or take a two year layoff—what a choice that is.

The layoff was without any benefits. So he did what any of us would do, he signed the waiver. He knew what the waiver meant, in the sense that he understood that he had voluntarily agreed to the conditions, he had read the fine print.

Mr. Hallas summed up the situation, I think quite well. During the hearing he said, "You know, you have to take care of your family. You have to pay your mortgages. You have to eat. You have to take care of what you have worked a lifetime for, so you sign the waiver."

The important point is that like Mr. Hallas, a perfectly well-informed worker can "knowingly and voluntarily" waive their rights to avoid loss of benefits, because the benefits themselves are too valuable to lose, not because the worker does not suspect age discrimination. And that is why I call it coercion, not "knowing and voluntary" choice, and I believe it should end.

Mr. Chairman, I believe we can stop this coercion by passing the ADEA Protection Act of 1989. It would nullify the EEOC rule which encourages unsupervised waivers, yet it would allow waivers in the instances where an employee has made a bona fide age discrimination charge. The unsupervised waiver would be authorized when it is a part of the settlement of the employee's claim.

Businesses will argue that restrictions on the use of the waiver will result in a lot of spurious age discrimination claims. Let me say that I think businesses requiring waivers may do more to generate claims by raising the worker's suspicion, than they would by not requiring waivers. Many businesses choose not to use waivers for just that reason—it makes workers more suspicious. If you will, if it is such a good offer, why should I have to waive my rights under the ADEA, workers ask? It is a very good question.

So I would like to commend you, Mr. Chairman, for having done a lot of work with the business community and other groups to make this bill more workable. I know you have also consulted with the EEOC to discuss their role in waiver supervision. I would hope that the concept of EEOC supervision will go beyond simply making sure workers are knowingly and voluntarily—at least as it is construed today and practiced today—waiving their rights.

If the EEOC is going to approve the wholesale use of waivers, that approval should be based on whether underlying early retirement incentive programs could be discriminatory. Mr. Chairman, if the EEOC is unable to determine what is or is not a discriminatory early retirement incentive plan, then we should be quite cautious about allowing retirees to give up all of their protections under the ADEA, supervised or unsupervised, in order to receive the benefits due them.

Last year, Mr. Donald Graham testified before this Committee during your May 24th hearing on this issue. In his statement he said, and I quote,

> Being terminated from a position not for fault or cause is bad enough, but when you are presented with a buy-out of your civil rights, it gave me, at least, a feeling of outrage that this sort of thing was happening. As I found out later, this is even encouraged and advocated by the EEOC. It makes you wonder whose side they are on and what other civil rights are going to be bought off.

Mr. Chairman, I do not think that we should allow anyone to be bought off. I look forward to continuing to work with you and your committee, so that we in the future may ensure equal treatment of all employees, regardless of their age.

[The prepared statements of Senators Heinz and Pryor follows]

NEWS FROM
SENATOR JOHN HEINZ
SPECIAL COMMITTEE ON AGING
Senate Hart 628 Washington, D.C. 20510-6400 (202) 224-1467

TESTIMONY OF SENATOR JOHN HEINZ
COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON LABOR
HEARING ON THE S. 54, THE ADEA WAIVER BILL
MARCH 16, 1989

MR. CHAIRMAN: It is a great pleasure to be here to testify on this legislation, which you and I introduced last year and again this year, to ensure that older workers are not coerced into waiving their rights under the law.

As you know in July 1987, the EEOC attempted to issue final rules permitting employees to waive their rights under the ADEA in the absence of agency supervision. These regulations would allow unsupervised waivers as long as the employee "knowingly and voluntarily" agrees to the conditions of the early retirement incentive offer and to the use of the waiver.

When the EEOC first issued these rules, I objected. It seemed to me then, as it does today, that "to enact a rule which would broadly exempt all employers and employees from ADEA protections could effectively strip workers of any protection from age discrimination."

We acted in October 1987 and again in June 1988 to place a moratorium on the implementation of the EEOC proposed rule. The last moratorium will expire on October 1, 1989. I do not believe we should continue to deal with this problem by using the temporary solution of a Congressional moratorium.

Mr. Chairman, I hope we can pass this legislation quickly to permanently stop wholesale use of unsupervised waivers in early retirement incentive offers. Businesses often require workers to sign away their rights to file an ADEA claim as a condition for receiving the offer, preventing the employee from later charging the company with age discrimination, regardless of whether these employees can know whether there is a pattern of age discrimination or not. The fact is, as long as there is a financial incentive involved and as long as the worker cannot know how the offer is structured, the signing of the waiver is coercive and premature.

Take, for example, the Hallas case. Last year, Mr. Robert Hallas, a constituent of mine, testified before the Senate Aging Committee on his experience with waivers. When his employer, U.S. Steel, needed to reduce its workforce, Mr. Hallas was asked to retire early and was faced with either receiving his health and pension retirement benefits, as long as he agreed to sign a waiver, or take a 2-year lay-off without benefits. He signed the waiver. He knew what the waiver meant, and he voluntarily agreed to the conditions. Mr. Hallas summed up the situation well, during this hearing. He said, "You know, you have to take care of your family. You have to pay your mortgage. You have to eat. You have to take care of what you've worked a lifetime for, so you sign the waiver."

The important point is that like Mr. Hallas, a perfectly well-informed worker can "knowingly and voluntarily" waive their rights to avoid loss of benefits, because the benefits themselves are too valuable to lose, not because the worker does not suspect age discrimination. This is coercion, not "knowing and voluntary" choice, and I believe it should end.

Mr. Chairman, I believe we can stop this coercion by passing the "ADEA Protection Act of 1989." It would nullify the EEOC rule which encourages unsupervised waivers, yet it would allow for waivers in the instances where an employee has made a bona fide age discrimination charge. The unsupervised waiver would be authorized when it is part of the settlement of the employee's claim.

Businesses will argue that restrictions on the use of the waiver will result in a lot of spurious age discrimination claims. Let me say that I think businesses requiring waivers may do more to generate claims, by raising the worker's suspicion, than they would by not requiring waivers. Many businesses choose not to use waivers for just that reason -- it makes workers more suspicious. "If it is such a good offer, why should I have my to waive my rights under the ADEA?"

I would like to commend you, Mr. Chairman, for having done a lot of work with the business community and other groups to make this bill more workable. I know you have also consulted with the EEOC to discuss their role in waiver supervision. I would hope that the concept of EEOC supervision will go beyond simply making sure workers are knowingly and voluntarily waiving their rights.

If the EEOC is going to approve the wholesale use of waivers, that approval should be based on whether underlying early retirement incentive programs could be discriminatory. Mr. Chairman, if the EEOC is unable to determine what is or is not a discriminatory early retirement incentive plan, then we should be quite cautious about allowing retirees to give up all of their protections under ADEA, supervised or unsupervised, in order to receive the benefits due them.

Last year, Mr. Donald J. Graham testified before this Committee during your May 24 hearing on the issue of the ADEA waiver. In his statement he said, and I quote, "Being terminated from a position not for fault or cause is bad enough, but when you are presented with a buy-out of your civil rights, it gave me, at least, a feeling of outrage that this sort of thing was happening. And as I found out later, this is even encouraged and advocated by the EEOC. It makes you wonder whose side they are on and what other civil rights are going to be bought off."

Mr. Chairman, I do not think that we should allow anyone to be "bought off". I look forward to our continued work together on this bill and I look forward to our work in the future to ensure equal treatment of all employees regardless of their age.

SENATOR DAVID PRYOR

THE AGE DISCRIMINATION IN EMPLOYMENT

WAIVER PROTECTION ACT OF 1989

As Chairman of the Senate Special Committee on Aging, I appreciate this opportunity to express my support for the proposed Age Discrimination in Employment Waiver Protection Act of 1989. I share Chairman Metzenbaum's deep concerns about the threat posed to older workers by unsupervised waivers of rights under the Age Discrimination in Employment Act (ADEA), and I salute him for holding this early hearing on this important legislation.

There is no doubt that older Americans constitute one of the most rapidly growing segments of our population. As a result, America's workforce also is aging, and the employment of older men and women is fast becoming a very critical issue in our nation.

For many older workers today, retirement is not an option. A growing number of older workers find it necessary for financial reasons to continue to work full-time or part-time. At the same time, too many employers have yielded to the temptation to unfairly and disproportionately target older workers for adverse employment actions. Sometimes employers engage in this kind of discriminatory practice because they have bought into negative stereotypes about older workers. More often, however, it is simply economics: older workers tend to earn more than younger, less experienced workers. Unfortunately, federal efforts aimed at addressing this issue have not been successful and the result is that age discrimination in employment practices continue.

The ADEA was designed by Congress to prevent unfair employment practices against older workers, and there is no doubt that strict enforcement of the Act is essential to the protection of this large segment of our nation's workforce. Allowing unsupervised waivers of those protections opens the door to the very abuses the Act was intended to shut out.

Unsupervised waivers of ADEA rights can be abused in a number of ways. For example, an employer could pressure an older worker into signing a waiver in exchange for benefits wrongly withheld or as a part of a discriminatory early-retirement incentive package.

Given the history of the ADEA and the fact that Congress specifically incorporated into the Act the more strict enforcement procedures of the Fair Labor Standards Act, it is my view that the ADEA prohibits any unsupervised waiver of rights. However, inconsistent court decisions have confused the matter, and, indeed, the Equal Employment Opportunity Commission (EEOC) in 1987 issued a rule which would allow unsupervised waivers of ADEA rights. Congress has postponed the effective date of this rule until October 1 in order to allow time for a legislative resolution of the issue.

Every first-year law student knows that a constitutional or statutorily created right cannot be waived unless the waiver is "knowing and voluntary." Although the EEOC's waiver rule contains this standard, it fails to assure any real confirmation of the knowing and voluntary nature of a waiver. In view of the results of a 1981 Harris poll conducted for the National Council on Aging in which half of the older workers questioned were not aware of their rights under the ADEA, I strongly believe that the knowing and voluntary nature of unsupervised waivers should be confirmed before such waivers are given legal effect.

The proposed Age Discrimination in Employment Waiver Protection Act of 1989, of which I am pleased to be a cosponsor, would clarify what I believe was the original intent of Congress when it passed the ADEA in 1967. Under this legislation, ADEA waivers are prohibited unless supervised by the EEOC or a court, or unless given in settlement of a bona fide ADEA claim.

Any unsupervised waiver given in a settlement must be given in exchange for something other than benefits to which the worker is already entitled. The settlement agreement must be in writing, and the worker must be advised in writing to consult an attorney and must be given a reasonable amount of time to consider the agreement. No prospective ADEA rights may be waived.

I have read with interest the comments of the members of the EEOC, and in particular those of Chairman Thomas, regarding this legislation. The changes suggested by Chairman Thomas are, for the most part, positive, and I believe that we can work with the EEOC to make a good bill better. However, for the reasons already discussed, I am firmly opposed to codifying the EEOC's proposed rule allowing unsupervised waivers. At the same time, I believe we should recognize the right of the older worker to waive ADEA rights where the waiver is not prospective and is verifiably knowing, voluntary, coercion-free and beneficial. Above all, we must keep in mind that the purpose of this bill is to protect the ADEA rights of older workers.

Unfortunately, evidence shows that the use of coercive tactics to secure the execution of ADEA waivers is increasing, and the time for action on this issue is now. The proposed Age Discrimination in Employment Waiver Protection Act of 1989 represents a sensible solution, and I look forward to working with Senator Metzenbaum, the EEOC, and others to ensure that the intent of Congress regarding the ADEA and the protection of older workers is made unmistakably clear.

Senator HEINZ. Mr. Chairman, I would ask unanimous consent to insert in the record at this point two letters, the one to yourself, myself and Senator Pryor, original co-sponsors from the American Association of Retired Persons, the Gray Panthers, the Older Woman's League, the National Council on Aging, National Council of Senior Citizens and the Villers Foundation, and another by the Leadership Council of Aging Organizations which has an even longer list of organizations which I will not read.

Senator METZENBAUM. Thank you, Senator Heinz and without objection both of those letters will be included in the record. I am very happy to have the support of those various groups whose names are affixed to those letters.

[The letters referred to by Senator Heinz follow:]

LEADERSHIP COUNCIL OF LC AO AGING ORGANIZATIONS

Lawrence T. Smedley, Chairman

February 3, 1989

The Honorable John P. Heinz
United States Senate
277 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Heinz:

We, the undersigned organizations, representing the interests of the older Americans nationwide, wish to express our strong support for the legislation you introduced today--the Age Discrimination in Employment Waiver Protection Act of 1989. This bill provides important and necessary protection for the rights of millions of older workers under the Age Discrimination in Employment Act (ADEA).

The Waiver Protection Act establishes a process by which older workers may validly waive their ADEA rights without supervision by the EEOC or the courts. The bill makes clear that unsupervised ADEA waivers are valid only when obtained in settlement of a specific charge or claim of age discrimination; therefore, employees could not be coerced into signing away their federal rights in order to participate in an early retirement, or exit incentive program. Benefits are offered in these programs not in exchange for settlement of a claim of discrimination, but as an inducement to leave employment.

This legislation is necessary to counter the effects of a rule issued by the EEOC that would have validated ADEA waivers obtained even in circumstances where the employee was unable to know whether an ADEA claim existed. Although this rule was twice suspended by Congress, the EEOC's refusal to modify or rescind the rule provided many employers with a shield against ADEA lawsuits and, effectively, a license to discriminate against older workers.

We applaud your action to preserve and enhance the rights of older workers to equal employment opportunity and look forward to working with you to ensure passage of this important bill.

Sincerely,

Larry Smedley

Lawrence T. Smedley
Chairman

National Council of Senior Citizens

American Association of Retired Persons

925 15th Street, N.W., Washington, D.C. 20005 (202) 347-8800

National Caucus and Center on Black Aged, Inc.

National Association of Retired Federal Employees

Catholic Golden Age

National Council on the Aging, Inc.

Villers Advocacy Associates

National Association of Area Agencies on Aging

National Association of State Units on Aging

National Association of Foster Grandparents Program Directors

National Association of Older American Volunteer Program Directors

National Association of RSVP Directors, Inc.

National Association of Senior Companion Project Directors

America Society on Aging

American Association for International Aging

January 25, 1989

The Honorable Howard M. Metzenbaum
The Honorable John P. Heinz
The Honorable David Pryor
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum, Senator Heinz and Senator Pryor:

We the undersigned organizations, representing the interests of older Americans nationwide, wish to express our strong support for the legislation you introduced today, the **AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989**. This bill provides important and necessary protection for the rights of millions of older workers under the Age Discrimination in Employment Act (ADEA).

The Waiver Protection Act establishes a process by which older workers may validly waive their ADEA rights without supervision by the EEOC or the courts. The bill makes clear that unsupervised ADEA waivers are valid only when obtained in settlement of a specific charge or claim of age discrimination. Therefore, employees could not be coerced into signing away their federal rights in order to participate in an early retirement or exit incentive program. Benefits are offered in these programs not in exchange for settlement of a claim of discrimination, but as an inducement to leave employment.

This legislation is necessary to counter the effects of a rule issued by the EEOC that would have validated ADEA waivers obtained even in circumstances where the employee was unable to know whether an ADEA claim existed. Although this rule was twice suspended by Congress, the EEOC's refusal to modify or rescind the rule provided many employers with a shield against ADEA lawsuits and, effectively, a license to discriminate against older workers.

We applaud your actions to preserve and enhance the rights of older workers to equal employment opportunity and look forward to working with you to insure passage of this important bill.

AMERICAN ASSOCIATION OF RETIRED PERSONS
GRAY PANTHERS, represented by the
NATIONAL SENIOR CITIZENS' LAW CENTER
OLDER WOMEN'S LEAGUE
NATIONAL COUNCIL ON AGING
NATIONAL COUNCIL OF SENIOR CITIZENS
VILLERS FOUNDATION

Senator **Metzenbaum**. Thank you, Senator Heinz. Senator David Pryor, the Chairman of the Select Committee on Aging and prime co-sponsor of this bill was unable to attend this morning's hearing. He has submitted a statement for the record and his statement will be inserted after that of Senator Heinz.

Our next witness, we are pleased to welcome Clarence Thomas, Chairman of the United States Equal Employment Opportunity Commission of Washington. Mr. Thomas, we are happy to have you with us this morning.

STATEMENT OF CLARENCE THOMAS, CHAIRMAN, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC.

Mr. **Thomas**. Good morning, Mr. Chairman, Senator Jeffords.

Senator **Metzenbaum**. Nice to see you again.

Mr. **Thomas**. Good seeing you. Thank you for inviting me to testify on S. 54, the Age Discrimination and Employment Waiver Protection Act.

We believe that S. 54 contains several positive elements that adequately protect the rights of older workers and we are certainly pleased that the proposed legislation will implement a number of safeguards which we had included in our rule on ADEA waivers.

We are concerned, however, that certain aspects of the bill may prevent older employees from exercising their rights, rather than protecting, particularly the requirement that a bona fide claim be communicated in good faith and in writing to the employer. This requirement may raise two problems for older workers.

First, it is not clear that written claims will provide additional protection for older employees. Requiring written claims of age discrimination could inhibit employers and employees from informally resolving age claims, which are frequently communicated verbally. Perhaps, instead, a verbal allegation of age discrimination could be referenced in a waiver agreement that might result.

Second, the requirement of good faith communication may add an obstacle for employees who choose to litigate their age claims in court. For example, the courts could require that an employee prove that a claim was communicated in bad faith before the court finds that a waiver is invalid.

To further protect the right of older workers, we urge that the bill include the following provision. No waiver agreement shall affect the Commission's rights and responsibilities to enforce the Act, nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

We also recommend that a charge filed with a State fair employment agency, as well as one filed with EEOC, should be deemed a bona fide claim to fulfill the requirements for an unsupervised waiver.

It should be made clear in either the bill or the legislative history that review of a prototype or other generic waiver agreement would be sufficient supervision and should further state that if there has been coercion or other individual circumstances which might invalidate the waiver, an individual can still file an age discrimination charge with EEOC.

Section 2 of the bill defines a bona fide claim among other things, as a specific allegation of age discrimination. We believe the bill intends that an aggrieved individual need assert only that age discrimination has occurred before a valid waiver can be executed. If we are correct, the language in question should be revised to the following: "an allegation of age discrimination." However, if the current language is intended to require the assertion of specific issues within an allegation of age discrimination, clarification of this point would be useful.

For nontechnical concerns that we have, the S. 54 could indeed impact, as has been noted on early retirement incentive programs. That is an issue, in my opinion, that the employer community is better able to address and should address. The second issue, however, is more parochial for me. That is, to the extent that Congress intends for the Commission to supervise the settlement of claims outside the existing administrative context, we anticipate that the legislation should have and would have an impact on the agency's workload, and additional resources would be necessary.

This is a major unknown variable for us. EEOC simply cannot continue to take on additional responsibilities without the commensurate resources to fulfill these responsibilities. To assess the requirements, we need to know how many employees waive their ADEA rights in the past few years without first filing an EEOC charge, a lawsuit, or serving their employer with a written allegation of discrimination, and how many of these types of waivers will continue after the legislation is enacted. Second, how many waiver agreements would actually be presented to the agency for review. Third, how many waivers will be presented to EEOC in charges filed after an agreement has been entered into. And finally, what Congress intends supervision to entail.

Thank you very much, Mr. Chairman, for giving me the opportunity to testify and I will be available for questions.

[The prepared statement of Mr. Thomas follows:]

TESTIMONY OF
CLARENCE THOMAS, CHAIRMAN
U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
U. S. SENATE
MARCH 16, 1989

Good morning Mr. Chairman and members of the subcommittee. Thank you for inviting me to testify on S. 54, the Age Discrimination in Employment Waiver Protection Act.

S. 54 provides that employees may not waive any ADEA rights without the supervision of the EEOC or a court except in settlements of a claim that illegal age discrimination has been committed. The bill would result in an increase in work for the government and in curtailment of employees' existing choice to waive rights without filing an age discrimination complaint. We believe that the rule we promulgated in 1987 is adequate to protect employees against pressure to waive their rights while preserving their choice to waive without filing a claim with the EEOC or in court. We continue to believe that this is a legitimate approach to this question; however, if Congress should enact such a bill as S. 54, we hope that our suggestions will be considered.

We believe that S. 54 contains several positive elements that adequately protect the rights of older workers. The commission is pleased that the proposed legislation would implement a number of the safeguards that were provided in our rule on ADEA waivers.

We are concerned, however, that certain aspects of the bill may prevent older employees from exercising their rights rather than protecting them, particularly the requirement that a "bona fide claim" be communicated "in good faith and in writing" to the employer. This requirement may raise two problems for older workers. First, it is not clear that written claims will provide additional protection for older employees. Requiring written claims of age discrimination could inhibit employers and employees from informally resolving age claims, which are frequently communicated verbally. Perhaps, instead, the verbal allegation of age discrimination should be referenced in any waiver agreement that might result.

Second, the requirement of "good faith" communication may add an obstacle for employees who choose to litigate their age claims in court. Would an employee seeking to set aside an invalid waiver be required to prove that a claim was not communicated in good faith?

To further protect the rights of older workers, we suggest the bill state that "no waiver agreement shall affect the commission's rights and responsibilities to enforce the act, nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a commission investigation."

We recommend that section 7(f)(3)(A) be revised to include a charge filed with a state fair employment agency as well as one filed with EEOC. Each should be deemed to constitute a "bona fide claim" for the purpose of fulfilling the requirements for an unsupervised waiver.

In the course of conciliating claims of age discrimination that have been filed with the commission, the commission already supervises waivers of age claims. To the extent that Congress intends for the commission to supervise the settlement of claims outside the existing administrative context, we anticipate that the legislation would have an impact on the agency's workload and additional resources would be necessary. To assess the impact of this legislation on EEOC's workload, we would need to know:

o How many employees waived their ADEA rights in the past few years without first filing an EEOC charge or lawsuit or serving their employer with a written allegation of discrimination and how many of these types of waivers would continue after the legislation is enacted;

- o How many waiver agreements would actually be presented to the agency for review;

- o How many waivers will be presented to EEOC in charges filed after an agreement has been entered into; and

- o What Congress intends supervision to entail.

We suggest that it be made clear in any bill or the legislative history that review of a prototype or other generic waiver agreement would be sufficient supervision. It also should be made clear that even when such a prototype has been properly supervised, where there has been coercion or where other individual circumstances exist which might make the waiver invalid, an individual could still file a charge with EEOC alleging a violation of the ADEA.

Section 2 defines a "bona fide claim," among other things, as "a specific allegation of age discrimination." We believe the bill intends that an aggrieved individual need assert only that age discrimination has occurred before a valid waiver can be executed. If we are correct, the language in question should be revised to: "an allegation of age discrimination...." However, if the current language is intended to require the assertion of specific issues (for example, benefits, demotion, discharge, harassment, etc.) within an allegation of age discrimination, clarification of this point would be useful.

I will be pleased to answer any questions you may have.

Senator **Metzenbaum**. Thank you very much. We appreciate your constructive suggestions, and we look forward to having further discussions with you to see if we can put together the package that is compatible with your concerns, as well as our concerns.

In your testimony you questioned whether a bona fide claim needs to be in writing. Frankly, my concern is that if the claim is not in writing we would have created an additional issue for litigation. Namely, whether an alleged claim was ever made. Do you see this as a problem?

Mr. **Thomas**. It is indeed an additional element. But I think many of the circumstances that surround these sorts of events or charges of discrimination are already verbally communicated. These are things that could be reduced to writing or that could be found out through investigations. I do not think it really would involve an additional problem for us, although it would be one more element that would have to be tied up at the end.

The problem is that not every informal resolution or statement of what a charge actually—not every claim is going to be reduced to writing. That is much more formal, and I think you would actually give the older worker more rights by not requiring that the initial claim be reduced to writing.

Senator **Metzenbaum**. Chairman Thomas, you have stated that individuals who waive their rights should still be able to file a charge with the EEOC. I think I am in agreement with you on that, but can you explain why as a matter of law and public policy such charges should survive the signing of a waiver?

Mr. **Thomas**. What is critical and it is something, of course, we discussed extensively when we went through the rule making is that even when there is a valid waiver, EEOC is not precluded from taking additional actions against the employer. The individual may validly waive his or her rights, but there could still be an additional problem that is more systemic or that is a pattern or practice of our problem with the organization, so we should have the right to go in to determine whether that exists.

Additionally, we may want to go in to determine whether or not there has been coercion. I think all too often there is talk that every single early retirement program involves coercion. Well, some do and some do not. And even where there are valid waivers, or facially valid waivers, there may still be coercion which constitutes a violation of the Age Act, and we want the opportunity to go in and find that out to our satisfaction.

Senator **Metzenbaum**. I understand there actually is some court support for the Commission's position?

Mr. **Thomas**. I do not have the name of the case on the tip of my tongue, but there is circuit court support for our right to go in and to investigate even though there is a valid waiver in place.

Senator **Metzenbaum**. Thank you. Senator Jeffords?

Senator **Jeffords**. I am concerned about the workload problem that may be created for you in the event this bill passes and what impact that might have on those people that we are trying to protect. I wonder if you could give us your experience, EEOC, with respect to 1988 claims.

For example, for the past 10 years, what changes have you seen in the volume or percentage of such claims filed in your organization?

Mr. THOMAS. About 20 to 25 percent of our workload are represented by age cases. In the past, the way either both the Department of Labor and earlier in EEOC, the way that these cases were dealt with was in a very rapid process. They were not fully or necessarily investigated at all. We adopted a policy that we would fully investigate all cases.

That is probably the major change because it requires us, it is a self-imposed obligation, to go through and investigate all cases. The age cases are much much more complicated, particularly those that involve early retirement programs.

Over the past seven years, what we have seen, particularly with the shifts with industry, the downsizing of companies, the acquisitions and mergers, what we have seen are a significant number of companies offering early retirement programs. And subsequent to those, you have allegations of discrimination across the program or individually. Now I think that, and I think it is generally understood at the Commission, that it is more expensive and more difficult to fully investigate any charge, and more expensive and more difficult to investigate age charges.

So the workload has increased numerically or quantitatively. Qualitatively the difficulty of investigating the cases, including the responsibilities that we have imposed on ourselves, has made it much much more difficult. So it is all going up. And if supervision is tantamount to investigating the charge, if they become equivalence or near equivalence, it is going to be very difficult, I think, from a resource standpoint to superimpose that on our existing workload.

Senator JEFFORDS. I would like a little bit better understanding of your understanding of what the Metzenbaum bill would do with respect to your obligations. Now you have mentioned, sir, the generic form that would be issued to try to measure, at least preliminarily, compliance. I am not sure that that is what the concept that Mr. Metzenbaum has, but go under two presumptions, one, that does go into effect and secondly, if you do not have that, if that is not what the conception is, what kind of workload demands do you anticipate?

Mr. THOMAS. As I indicated in my testimony, there are considerable number of variables that we just do not have the answers to, but if we are required to individually monitor each of the circumstances in which there are early retirement incentive programs or where there are waivers, I am convinced it would add considerably to our workload. And even if it added 10 percent to what we are doing from a time standpoint, even that modest amount, we simply do not have the resources. If it added 5 percent, we do not have the resources.

We are, because of the last two fiscal years, where our appropriations did not reach the level of the President's request by a large amount, we are treading water. It is as simple as that.

Senator JEFFORDS. Let me get your understanding of under those circumstances, as to what would happen to the plan if a complaint was made or somehow you had not investigated, or you felt you should investigate, would that plan be held in abeyance and the people not be able to receive the compensation which they intended to get on?

Mr. **Thomas**. If pre-approval is required, and I assume that it would be, the plan could not go into effect until we had an opportunity to review it to the fullest extent and that would hold it up. And right now our average processing time exceeds 200 days, and that is two-thirds of a year.

Senator **Jeffords**. That is your present workload conditions?

Mr. **Thomas**. That is right.

Senator **Jeffords**. So if you had a very substantial increase in your workload because of this, then that time period would be extended?

Mr. **Thomas**. Exactly.

Senator **Jeffords**. Let us go to the other situation where you would have a generic form which would go out and I presume that if they complied with the form, they would be allowed to go forward with their plan?

Mr. **Thomas**. I think we would want to—that would facilitate a portion of it. But I think that we would want to look at the plan itself. I do not think that in and of itself a prototype would be all that we would look at. It would just simply be that I think in some circumstances, at least we do not have to look at the waiver form itself. If we went as far as just using a prototype, we would be right back to our waiver policy.

I would assume that this Committee wants us to do a little bit more than that. I simply wanted to have the option in the agency of providing a prototype plan. In some circumstances where it is simple, for example, if it is a one on one, or if it is a small retirement program, then I think it would be much easier. I think it would certainly give guidance early on.

Senator **Jeffords**. Now let me ask you this question. You are in the process of rule making now and what you have ruled, some rules promulgated, but you are still in the process. I am wondering what kind of suggestions that you could give us or what kind of standards you intend to use in the remaining aspects of your rule making; can you tell us that or is that premature?

Mr. **Thomas**. On the early retirement, we have actually published an advanced notice of proposed rule making to attempt to get information as to what kinds of early retirement incentive programs are out there and what the universe looks like. I do not think that it is responsible to go out and make a rule without knowing. The response to that has not been overwhelming. And I do not think that we can engage in rule making until we have a better response than we did with the advance notice of proposed rule making.

So we are really at a point now of rethinking whether or not we should go forward with further notices or proposed rule making in order to get additional information before we decide what standards or what approach we are going to use in the early retirement incentive area.

Senator **Jeffords**. Thank you.

Senator **Metzenbaum**. I want to thank you, Chairman Thomas, and we look forward to working with you.

After introducing S. 54, Senators Pryor, Heinz and I wrote to each of the five EEOC commissioners requesting their views on this legislation. At this point I would like to insert in the record our letter to the five commissioners and their individuals responses to us.

[The letters referred to above follow:]

EDWARD M. KENNEDY, CHAIRMAN

CLAIBORNE PELL, RHODE ISLAND
HOWARD M. METZENBAUM, OHIO
SPARK M. MATSUNAGA, HAWAII
CHRISTOPHER J. DODD, CONNECTICUT
PAUL SIMON, ILLINOIS
TOM HARKIN, IOWA
BROCK ADAMS, WASHINGTON
BARBARA A. MIKULSKI, MARYLAND

ORRIN G. HATCH, UTAH
ROBERT T. STAFFORD, VERMONT
DAN QUAYLE, INDIANA
STROM THURMOND, SOUTH CAROLINA
LOWELL P. WEICKER, JR., CONNECTICUT
THAD COCHRAN, MISSISSIPPI
GORDON J. HUMPHREY, NEW HAMPSHIRE

THOMAS M. ROLLINS, STAFF DIRECTOR AND CHIEF COUNSEL
KRISTINE A. IVERSON, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

February 7, 1989

Chairman Clarence Thomas
U.S. Equal Employment Opportunity Commission
Washington D.C. 20507

Dear Chairman Thomas:

Last month, we introduced S.54, the Age Discrimination in Employment Waiver Protection Act. This important legislation aims to ensure that older workers are not coerced into waiving their rights under federal law. We believe the bill also minimizes burdens on the Commission, by allowing older workers who have demonstrated an interest in asserting or protecting their rights to settle claims without government involvement.

We are interested in the views of each Commissioner regarding this legislation. We enclose a copy of the bill plus our opening statements on the floor of the Senate. We would appreciate a response from each Commissioner to each of the following questions:

1. Do you believe that we have adequately protected the rights of older workers, within the parameters of the legislation?
2. What effect would the legislation have on EEOC's workload, given that supervision could be called for only in instances where a bona fide claim has not arisen?
3. Do you have any additional comments on the legislation, including specific suggestions for improvements or overall reactions to the merits of the bill?

We would appreciate receiving your responses by Friday, February 24. Thank you in advance for your cooperation.

Sincerely,

Howard M. Metzenbaum
John Heinz
David Pryor

cc: Commissioner Silberman
Commissioner Kemp
Commissioner Gallegos
Commissioner Cherian

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

[illegible]

The Honorable Howard M. Metzenbaum
The Honorable John Heinz
The Honorable David Pryor
United States Senate
Washington, D.C. 20510

Dear Senators:

Your February 7 letter requested the Equal Employment Opportunity Commission's views on S. 54, the Age Discrimination in Employment Waiver Protection Act.

S. 54 provides that employees may not waive any ADEA rights without the supervision of the EEOC or a court except in settlements of a claim that illegal age discrimination has been committed. The bill would result in an increase in work for the government and in curtailment of employees' existing choice to waive rights without filing an age discrimination complaint. We believe that the rule we promulgated in 1987 is adequate to protect employees against pressure to waive their rights while preserving their choice to waive without filing a claim with the EEOC or in court. We continue to believe that this is a legitimate approach to this question; however, if Congress should enact such a bill as S. 54, we hope that our suggestions in response to the following questions will be considered.

1. Do you believe that we have adequately protected the rights of older workers, within the parameters of the legislation?

We believe that S. 54 contains several positive elements that adequately protect the rights of older workers. The commission is pleased that the proposed legislation would implement a number of the safeguards that were provided in our rule on ADEA waivers.

We are concerned that certain aspects of the bill may prevent older employees from exercising their rights rather than protecting them, particularly the requirement that a "bona fide claim" be communicated "in good faith and in writing" to the employer. This requirement may raise two problems for older workers. First, it is not clear that written claims will provide additional protection for older employees. Requiring written claims of age discrimination could inhibit employers and employees from informally resolving age claims, which are frequently communicated verbally. Perhaps, instead, the verbal allegation of age discrimination should be referenced in any waiver agreement that might result.

Second, the requirement of "good faith" communication may add an obstacle for employees who choose to litigate their age claims in court. Would an employee seeking to enforce a waiver agreement be required to prove that a claim was made in "good faith?" Conversely, would an employee seeking to set aside an invalid waiver be required to prove that a claim was communicated in bad faith?

To further protect the rights of older workers, we suggest the bill state that "no waiver agreement shall affect the commission's rights and responsibilities to enforce the act, nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a commission investigation."

We recommend that section 7(f)(3)(A) be revised to include a charge filed with a state fair employment agency as well as one filed with EEOC. Each should be deemed to constitute a "bona fide claim" for the purpose of fulfilling the requirements for an unsupervised waiver.

2. What effect would the legislation have on EEOC's workload, given that supervision could be called for only in instances where a bona fide claim has not arisen?

In the course of conciliating claims of age discrimination that have been filed with the commission, the commission already supervises waivers of age claims. To the extent that Congress intends for the commission to supervise the settlement of claims outside the existing administrative context, we anticipate that the legislation would have an impact on the agency's workload and additional resources would be necessary; however, a more precise answer depends upon many unknown variables. For example, we would need to know:

o How many employees waived their ADEA rights in the past few years without first filing an EEOC charge or lawsuit or serving their employer with a written allegation of discrimination? How many of these types of waivers would continue after the legislation is enacted? How many waiver agreements would actually be presented to the agency for review?

o How many waivers will be presented to EEOC in charges filed after an agreement has been entered into?

o What does Congress intend supervision to entail? We suggest that it be made clear in any bill or the legislative history that review of a prototype or other generic waiver agreement would be sufficient. It also should be made clear that even when such a prototype has been properly supervised, where there has been coercion or where other individual circumstances exist which might make the waiver invalid, an individual could still file a charge with EEOC alleging a violation of the ADEA.

3. Do you have any additional comments on the legislation, including specific suggestions for improvements or overall reactions to the merits of the bill?

Section 2 defines a "bona fide claim," among other things, as "a specific allegation of age discrimination." We believe the bill intends that an aggrieved individual need assert only that age discrimination has occurred before a valid waiver can be executed. If we are correct, the language in question should be revised to: "an allegation of age discrimination...." However, if the current language is intended to require the assertion of specific issues (i.e., benefits, demotion, discharge, harassment, etc.) within an allegation of age discrimination, clarification of this point would be useful.

The Office of Management and Budget has advised that there is no objection to the submission of this report to the Congress from the standpoint of the administration's program.

Thank you for providing the opportunity to comment on S. 54. If you would like to discuss this issue further, please let me know.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20507

Office of the
Commissioner

February 24, 1989

The Honorable Howard M. Metzenbaum
The Honorable John Heinz
The Honorable David Pryor
United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Senators:

Thank you for the opportunity to comment on S. 54, the Age Discrimination in Employment Waiver Protection Act. I have had extensive discussions with my fellow Commissioners concerning the bill. My technical comments have been included in the letter from Chairman Thomas, which you should receive shortly.

I do believe S. 54 adds significant protections for older workers while balancing the need for employers and employees to resolve disputes quickly and informally. I would especially like to draw your attention to three issues addressed in the Chairman's letter. First, I am concerned that requiring employees to communicate their claims of age discrimination "in good faith" could inadvertently increase an employee's burden of proof when a waiver is contested in court.

Second, I believe the definition of "bona fide claim" should include claims filed with state fair employment agencies. Because these agencies investigate claims of age discrimination pursuant to deferral agreements with the Commission, such claims should be treated the same as those filed with the EEOC.

Finally, to ensure that the Commission's ability to protect the rights of older workers is not impaired, I recommend including the following language:

> No waiver agreement shall affect the Commission's rights and responsibilities to enforce the Act, nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

I welcome your efforts to confer with the Commission on the difficult issues that confront us in this area. If you have any further questions, I would be pleased to discuss them with you.

Sincerely,

Evan J. Kemp, Jr.
Commissioner

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20506

Office of the
Commissioner

SEP 27 1989

The Honorable Howard M. Metzenbaum
The Honorable John Heinz
The Honorable David Pryor
United States Senate
Washington, D.C. 20510

Dear Senators:

Thank you for the opportunity to comment on S. 54, the Age Discrimination in Employment Waiver Protection Act. My initial comment is one of agreement with this legislation, as well as any future legislation, that aims to ensure that all protected workers are not coerced into waiving their rights to equal employment opportunity under federal law.

With respect to the three questions that you have posed, I have received a copy of Chairman Thomas' response. Based on my examination of and input into the Chairman's letter to you, I attach myself to his comments.

In further response to question number 3, I want to point out that while S. 54 provides waiver protection only in the context of age claims, we should be mindful that employers are using form releases to obtain waivers of not only age claims, but all civil rights claims. I agree with Commissioner Cherian's comment to the extent that as presently crafted, S. 54 may be interpreted to establish one standard for protecting the rights of olders workers and a different, and possibly lesser, standard for other workers who are covered under Title VII.

Again, thank you for the opportunity to comment on S. 54. If you would like to discuss my comments further, please do not hesitate to contact me.

Sinceramente,

Tony E. Gallegos
Commissioner

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20506

Office of the
Commissioner

February 17, 1989

The Honorable Howard M. Metzenbaum
The Honorable John Heinz
The Honorable David Pryor
United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510-6300

Dear Senators Metzenbaum, Heinz and Pryor:

Thank you for inviting me to express my personal views on S. 54, the Age Discrimination in Employment Waiver Protection Act.

I hope the legislation as now drafted will effectively achieve the purpose its sponsors have in mind. I do not believe the victims of civil rights violations should be put in the position of waiving their rights unknowingly, as has been alleged often happens in large-scale corporate reorganizations in which some workers are offered an early-retirement-incentive carrot conditioned on waiving their civil rights.

I am, however, concerned that the bill is limited to the waiver protection issue under the Age Discrimination in Employment Act (ADEA). Often the very release form used by employers to obtain waivers under the ADEA includes a waiver of other civil rights claims, in particular race, national origin, sex or religious discrimination claims under Title VII of the Civil Rights Act.

As Senator Metzenbaum stated while introducing this bill: "This change in current ADEA law is intended to recognize the analogous circumstance of an individual dispute under title VII." Congressional Record at S356 (Jan. 25, 1989). The problem is that the EEOC's own ADEA waiver rule, now proposed to be rescinded by this bill, also had the same proclaimed objective. With this obvious room for disagreement as to the state of the law on waivers under Title VII, it may be desirable for the Congress to forthrightly state the law on the subject under Title VII.

Differences in statutory language of Title VII and the ADEA on procedural matters have prompted some courts and the Comptroller General to infer an intent on the part of the Congress to treat the charges under the two differently. I am enclosing a copy of the Comptroller General's decision in Albert D. Parker, B-215672

(1985) as an example (differences in federal employees' entitlement to attorney fees under the ADEA and Title VII).

I am afraid that unless this bill expressly applies to Title VII as well as ADEA, it might have an unintended and undesirable effect. The courts might think that by explicitly applying the waiver language only to ADEA the Congress meant for it not to apply to Title VII.

Because the bill would permit unsupervised waivers where a person has in good faith communicated an age discrimination allegation in writing (proposed sec. 7(f)(3)(C)), it is unclear whether a person would still be able to file a charge of age discrimination. In EEOC v. Cosmair, Inc., 821 F. 2d 1085 (5th Cir. 1987), the Commission successfully argued that the waiver of a right to file an EEOC charge was void as against public policy. The Congressional intent on this issue should be clarified.

As to the impact of this legislation on EEOC's workload, the Commission's Office of Program Operations is perhaps best suited to give an opinion. However, if the Congressional intention in requiring EEOC supervision is limited to those situations where an individual waives his claims as a condition of accepting relief under a settlement that is the product of an EEOC directed investigation or an EEOC suit, it should not impose any new burdens on us. I am informed that that is what the Labor Department viewed as being a supervised waiver. But if the Congress intends the Commission to supervise the payments under early retirement incentive plans, or pass upon their validity, upon a corporate invitation in order for the latter to make the waivers stick, I am certain the legislation will add vastly to our workload and require additional human and financial resources. It will be helpful for the Congressional intent to be spelled out as to what is meant by waivers under EEOC supervision.

Let me assure you that I personally strongly support any attempt that would strengthen protections for the intended beneficiaries of the civil rights legislation that the Congress has entrusted me to enforce. I remain available to discuss with you personally this or any other measures that would strengthen civil rights enforcement.

Sincerely,

Joy Cherian
Commissioner

Enclosure

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, DC 20507

Office of the
Vice Chairman

February 23, 1989

The Honorable Howard M. Metzenbaum
The Honorable John Heinz
The Honorable David Pryor
United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510-6300

Dear Senators Metzenbaum, Heinz and Pryor:

Thank you for your request for comments on S. 54. I concur fully with the comments submitted on behalf of the Commission by Chairman Thomas.

Sincerely,

R. Gaull Silberman
Vice Chairman

Senator METZENBAUM. I would also note for the record that in addition to the constructive suggestions from Chairman Thomas which were endorsed by Commissioners Kemp, Gallegos, and Silberman, we also received expressions of support from Commissioners Kemp, Gallegos and Cherian. Thus, Commissioner Kemp wrote, "I do believe S. 54 adds significant protection for older workers while balancing the need for employers and employees to resolve disputes quickly and informally."

Commissioner Gallegos wrote, "My initial comment is one of agreement with this legislation that aims to ensure that all protected workers are not coerced into waiving their rights to equal employment opportunity under federal law."

And Commissioner Cherian added his concern that in large-scale corporate reorganizations, "Some workers [may be] offered an early-retirement-incentive carrot conditioned on waiving their civil rights."

I offer these quotations as an indication that the EEOC is generally supportive of what we in Congress are attempting to do in this legislation. We welcome this support, as well as the Chairman's constructive suggestions for improving our approach.

Our next witness is Joseph F. Delfico, Director of Income Security with the United States General Accounting Office.

STATEMENT OF JOSEPH F. DELFICO, DIRECTOR, INCOME SECURITY, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC, ACCOMPANIED BY GLENN DAVIS, DONALD SNYDER, AND BERMA KLEIN

Mr. DELFICO. Mr. Chairman, today with me is Mr. Donald Snyder and Mr. Glenn Davis, both of whom have helped prepare this testimony, and in the audience is Berma Klein who is my assistant director who is in charge of all the work in this particular area. And with your permission I would like to submit my full testimony for the record and give you a five minute brief summary.

Senator METZENBAUM. I would be very happy to have you do so, and if you would like the fourth person to come up to the table, we would be very happy to have her.

Mr. DELFICO. Thank you, Mr. Chairman. I am pleased to be here today to discuss companies' use of waivers in exit incentive programs. When companies attempt to reduce employment, they may offer programs with extra or enhanced benefits or encourage employees to leave the company voluntarily. According to a recent study, 55 percent of a sample of large companies offered these exit incentive programs at least once during the period 1980 to 1985.

As a condition for receiving enhanced benefits, companies sometimes require employees to waive certain legal rights to file claims and lawsuits against the company. As you recall in January, you asked us to review waiver practices of the Fortune 100 companies.

Using information obtained through a telephone survey of company representatives, we identified the prevalence and the trends in waiver priorities from 1979 to 1988 for 60 companies.

Our testimony will be based on data from those 60 companies. We found that about 82 percent of the Fortune 100 companies we surveyed sponsored an exit incentive program at least once during the decade 1979 through 1988. About a quarter of these companies required their employees to sign a waiver as a condition for receiving enhanced benefits.

Overall, waivers were used most often during the years 1985 through 1988. I will get to that point later in my testimony.

Company officials reported that during 1979 through 1988, 24 percent of the companies sponsoring an exit incentive program required employees to sign a waiver to receive enhanced benefits. 50 percent of these companies having employees sign a waiver did so in only one year. The other 50 percent did it in multiple years.

The majority of the non-pension exit incentive programs were offered in 1987 and 1988, the last two years in our survey. The number of companies using waivers increased over the past 10 years. The percentage of companies using waivers in exit incentive programs almost tripled over the decade. Overall, waivers were used most often during 1985 through 1988. And you could see that in the attachment to my testimony, I think which is the last page, you could see the trends increasing through 1988.

Complete data on worker participation in exit incentive programs are not available from our sample companies. We do know, however, that the companies we surveyed had at least 161,000 employees electing to leave through these programs through 1979 and 1988. This is an average of about 3,000 workers per company.

The data we obtained on the 161,000 employees show that 97 percent left between 1985 and 1988; 51 percent left with enhanced early retirement benefits; 10 percent were required to sign waivers in order to receive enhanced benefits under any type of incentive program; and 3 percent of the people signed waivers to receive enhanced early retirement benefits.

We also asked company officials about the factors influencing the decision to use waivers. In general, officials said their companies used waivers to avoid having terminated employees file claims and lawsuits after they received enhanced benefits from exit incentive programs.

Most officials in companies not using the waiver said that their companies did not, because they believed that no claims or lawsuits would be filed given the voluntary nature of their exit incentive programs. Officials also told us that they believed the inclusion of waivers would have negatively affected the relationships with their current employees.

Mr. Chairman, that concludes my summary remarks. I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Delfico follows:]

United States General Accounting Office

GAO

Testimony

For Release
on Delivery
Expected at
10:15 a.m. EST
Thursday,
March 16, 1989

AGE DISCRIMINATION

Use of ADEA Waivers by Large Corporations

Statement of
Joseph F. Delfico, Director of
Income Security Issues
Human Resources Division

Before the
Committee on Labor and Human
Resources
Subcommittee on Labor
United States Senate

SUMMARY

Companies may sometimes require employees to waive their rights to file claims and lawsuits against the company as a condition for receiving enhanced benefits under special short-term programs designed to encourage early departure through some form of financial incentive (exit incentive programs). The Congress and others are concerned that companies' use of unsupervised waivers does not fairly protect the legal rights of older workers, particularly the right to file age discrimination claims under the Age Discrimination in Employment Act of 1967. These waivers are considered unsupervised because neither the government nor the courts oversee their use.

Using information obtained through a telephone survey of company representatives, we identified the prevalence and trends in waiver practices from 1979 to 1988 for 60 Fortune 100 companies.

Our results on the use of waivers over the years from 1979 through 1988, as reported by company officials, show that:

- -- 24 percent of the companies sponsoring an exit incentive program required employees to sign a waiver to receive enhanced benefits,
- -- 50 percent of companies having employees sign waivers did so in only one year, and
- -- overall, 40 percent of incentive programs with waivers included nonpension exit incentive benefits. The majority (63 percent) of these programs were offered in 1987 and 1988.

The number of companies using waivers increased over the past 10 years. The percentage of companies using waivers in exit incentive programs almost tripled over the decade. Overall, waivers were used most often during the years 1985 through 1988. Our analysis of trends in the use of waivers also shows that:

- -- from 1979 through 1984, few companies sponsoring incentive programs used waivers, and
- -- in 1987 and 1988, the two-year period when waivers were used the most, 27 percent of companies with exit incentive programs used them.

Companies using waivers reported doing so to avoid having terminated employees file claims and lawsuits against the company. Companies not using waivers opted not to because of the voluntary nature of their exit incentive programs.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss companies' use of waivers in exit incentive programs. When companies attempt to reduce employment, they may offer programs with extra or enhanced benefits to encourage employees to leave the company voluntarily. According to a recent study, 55 percent of a sample of large companies offered these exit incentive programs at least once during 1980 to 1985.[1]

As a condition for receiving enhanced benefits under these programs, companies sometimes require employees to waive certain legal rights to file claims and lawsuits against the company. These waivers are considered unsupervised because neither the government nor the courts oversee their use. Waivers may cause workers to unknowingly release their legal rights. The Congress and others are concerned about companies' using them without oversight. Today we will [illegible] findings on companies' waiver practices to help your efforts to explore this controversial practice.

BACKGROUND

Exit incentive programs are designed to encourage early departure from a company through some form of financial incentive offered to workers for a limited time. Common examples include (1) providing workers additional credit under the company pension plans' early retirement provisions or (2) offering some other specially designed exit incentive, like cash bonuses, not connected to the pension plan (nonpension benefits). Companies may also offer exit incentive programs which combine these two features. Companies may also choose to provide nonpension benefits to workers eligibile for early retirement.

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[1] Hewitt Associates, Plan Design and Experience in Early Retirement Windows and in Other Voluntary Separation Plans, 1986.

The Congress and others are particularly concerned about workers 40 and older waiving their rights to file age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA). This concern is driven in part by reports that some older workers may have been coerced into signing waivers or may have done so without being fully aware that such action would negate their rights under ADEA.

Because of the controversy surrounding the use of unsupervised waivers, the Equal Employment Opportunity Commission (EEOC) proposed a rule setting guidelines for the appropriate use of these waivers, which was scheduled to become effective in September 1987. Soon thereafter, the Congress passed legislation that directed the EEOC to suspend its proposed rule. This legislation will expire in September 1989. Under one provision of your proposed bill, the Age Discrimination in Employment Waiver Protection Act, S. 54, unsupervised waivers could not be used as a condition for receiving enhanced benefits under exit incentive programs.

In January 1989, you asked us to review waiver practices of the *Fortune* 100 companies from 1979 to 1988. To accomplish this, we interviewed appropriate officials from 60 of these companies by telephone between February 9 and March 10, 1989.

COMPANY USE OF WAIVERS

About 82 percent of the *Fortune* 100 companies we surveyed sponsored an exit incentive program at least once during 1979 through 1988, according to company officials. About a quarter of these companies required their employees to sign a waiver as a condition for receiving enhanced benefits. Overall, waivers were used most often during the years 1985 through 1988.

Of those companies that sponsored exit incentive programs, 38 percent offered only enhanced early retirement benefits under the company's pension plan and 44 percent offered these benefits in combination with other types of benefits not related to the company's pension plan. The remaining 18 percent of companies offered nonpension benefits alone or in combination with early retirement benefits. Employees meeting or close to the pension plan's retirement eligibility age generally received benefits from the enhanced early retirement program. Workers who were not eligible for early retirement benefits were offered other types of exit incentives.

Of those companies that offered enhanced early retirement benefits, 58 percent liberalized plan provisions by adding years to workers' age and/or years of service. This enabled employees to become eligible for retirement sooner than they otherwise would have and to get a greater pension amount than they would have received if their actual age and years of employment were used to calculate benefits. Other enhancements companies made to pension plans included (1) the elimination or reduction of early retirement penalties which reduce the pension benefit that would have been received at normal retirement and (2) a bridge payment which lasts until employees are eligible to receive social security benefits at age 62.

The nonpension exit incentives *Fortune* 100 companies used took a variety of forms--ranging from lump sum payments to continuing to pay employees' salaries after they leave. Of the companies sponsoring these incentives, 52 percent offered employees salary continuance for a specified period of time based on their service with the company.

Company officials reported that during 1979 through 1988:

-- 24 percent of the companies sponsoring an exit incentive program required employees to sign a waiver to receive enhanced benefits (see figure 1),

-- 50 percent of companies having employees sign waivers did so in only one year, and

-- overall, 40 percent of incentive programs with waivers included nonpension exit incentive benefits. The majority (63 percent) of these programs were offered in 1987 and 1988.

10-YEAR TREND IN WAIVER USAGE

The number of companies using waivers increased over the past 10 years. The percentage of companies using waivers in exit incentive programs almost tripled over the decade (see figure 2). Overall, waivers were used most often during the years 1985 through 1988. Our analysis of trends in the use of waivers also shows that:

-- from 1979 through 1984, few companies sponsoring incentive programs used waivers, and

-- in 1987 and 1988, the two-year period when waivers were used the most, 27 percent of companies with exit incentive programs used them.

SELECTED DATA ON PARTICIPANTS

Since our focus was on companies, we gathered participant data only if readily available. Complete data on workers' participation in exit incentive programs were not available from all our sampled companies. The companies we surveyed had at least 161,000 employees electing to leave through exit incentive programs between 1979 and 1988. This is an average of over 3,000 workers per company.

The data we obtained on the 161,000 employees show that:

-- 97 percent left between 1985 and 1988,

-- 51 percent left with enhanced early retirement benefits,

-- 10 percent were required to sign waivers in order to receive enhanced benefits under any type of incentive program, and

-- 3 percent signed waivers to receive enhanced early retirement benefits.

We also asked company officials about the factors influencing the decision to use waivers. In general, officials said their companies used waivers to avoid having terminated employees file claims and lawsuits after receiving enhanced benefits from exit incentive programs.

Most officials in companies not using waivers said that their companies did not because they believed that no claims or lawsuits would be filed given the voluntary nature of their exit incentive programs (see attachment). Officials also told us that they believed that the inclusion of waivers would have negatively affected their relationship with current employees. One company representative told us that he believed using a waiver would have raised suspicion about the integrity of the exit incentive program and the company's intent.

We plan to complete our work shortly and will include an analysis of the types of waivers used by companies in our sample. These waivers are now being mailed to us. We will issue a report to you after our analysis is complete.

Mr. Chairman, this concludes my prepared remarks. I will be pleased to respond to questions.

We asked the companies we surveyed why they did or did not use waivers. Some of their comments, as we recorded them, follow. Those companies using waivers were nearly universal in saying the company wanted to protect itself from lawsuits (or claims). One company official added that the company was "saving younger peoples' jobs."

Companies Without Waivers

Officials in 19 companies indicated the company did not require a waiver because "the program was voluntary" (8 companies), "bad for employee relations" (6 companies) or "no lawsuit anticipated" (7 companies). "

Other comments:

-- ". . . uncertainty as to the legal standing of waivers."

-- ". . . insulting to employees."

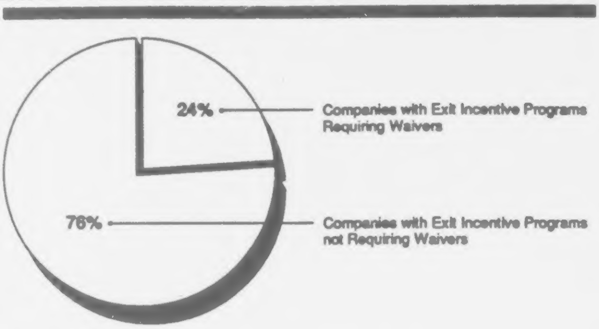
-- "Waivers wouldn't make any difference. Employees could still sue the company."

-- "Waivers were not necessary because the program was strictly voluntary. The company counseled people on the details, including giving them instructions for computing benefits."

-- "The program was voluntary: not performance-based separation."

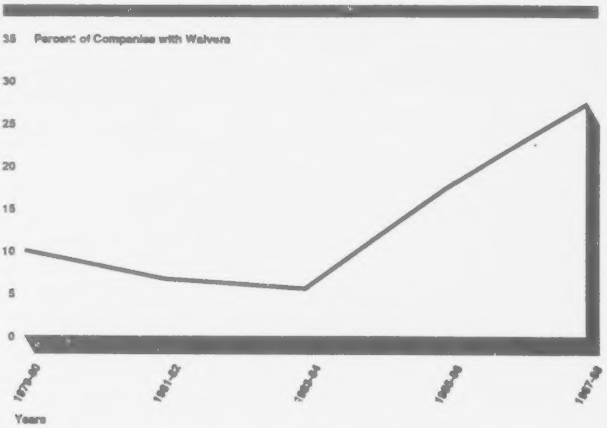
-- "Each employee who thinks he or she might want to participate is counseled."-- ". . . purely voluntary program."
-- "Because it was such a good deal the company did not think they would have problems."
-- "We offered it to everyone eligible to retire and did not establish separate classes of employees."
-- "downsizing is a legitimate business operation . . . there is no need for waivers."
-- "program . . . voluntary, so . . . no point to a waiver."

Figure 1. Waiver Usage by Fortune 100 Companies with Exit Incentive Programs, 1979-1988



Based on 49 Companies

Figure 2. Trends in Waiver Usage - Fortune 100 Companies with Exit Incentive Programs, 1979-1988



Based on 49 Companies

Senator METZENBAUM. Mr. Delfico, you testified that among the companies you surveyed, some 160,000 employees participated in exit incentive programs between 1979 and 1988. Those companies employed some 6 million workers, about 5 percent of our national work force. Would it be fair to estimate that as many as a million workers may have taken part in exit incentive programs nationwide over the last 10 years?

Mr. DELFICO. Mr. Chairman, that is probably as good an estimate as any at this stage in the game. I would not consider it a scientific estimate, but I do not see any around that can beat that. That is a good projection.

Senator METZENBAUM. Among the employers that have not used waivers in the past, what comments did you receive about litigation frequency and cost?

Mr. DELFICO. The attachment to the testimony delineates a number of comments we received, but basically the employers that do not use waivers, did not feel that they would be sued. I mean there is a general feeling amongst the ones we talked to that there was not any fear of that. They said if there was a problem, they said by and large, waivers would not make any difference is one quote we have in here. Employees could still sue the company, that was the prevalent feeling. They felt that it was insulting to their employees, so therefore they did not want to go along with using waivers.

There was uncertainty as to the legal standing of waivers, so therefore they were hesitant in using waivers. So a number of these things came into play in their decision.

Senator METZENBAUM. When will your final report be ready Mr. Delfico?

Mr. DELFICO. We hope to get all the data in from these employers in the next six weeks. It takes a while for them to mail their information to us. We have started to see a trickle in now. We will probably get you a report between two and three months from now, based on when we get the information in from the employers.

Senator METZENBAUM. Thank you very much. Senator Jeffords?

Senator JEFFORDS. That answers one of my questions. We have a little trouble from your percentages and all and not having the raw data to completely understand your synopsis which you have given us. I wonder how reliable is your generalization from a very narrow or limited sample of Fortune 100. You said that the Chairman's guess was as good as any, but how do we get a better one?

Mr. DELFICO. Obviously, you probably need to sample more companies to get a better one, Senator Jeffords. What we feel is we will have in our report, pretty accurate data, good position, good accuracy for the Fortune 100, and that is the sample. Projecting from the Fortune 100, the position goes down, but we do not see any reason why it would vary too much for say the Fortune 1,000 companies. They are roughly the same; the only problem is that as you get down in company size, you find fewer and fewer offering exit incentive programs because there is an economic situation here. They cannot afford to. So the problem may go away essentially as you get down to smaller companies.

Senator **Jeffords**. To your knowledge is there any way that these plans could be determined. There is no one that keeps track of this right now?

Mr. **Delfico**. I have no idea. We found it difficult even to get benefit people at the companies to come up with accurate information. It took quite a bit of persistance on the staff's part to get them to come forth with it. We were asking for 10-year data, and that was one of the problems. I suspect with enough time, you probably would get accurate data from a large sample of companies.

Senator **Jeffords**. Would you judge that you would have to do it with respect to a random sample of other companies to give you any kind of a statistically reliable determination as the number that have used plans?

Mr. **Delfico**. We have done a random sample to Fortune 100, so we will have a scientific base for projecting there.

Senator **Jeffords**. Oh, your sample of the Fortune 100 is only a random sample not a complete sample?

Mr. **Delfico**. Yes, it is not a complete sample. We are not going to sample 100 companies, we will try to get as close to 80 as possible—80 will give us a scientific sample.

Senator **Jeffords**. That is true. How many would you guess that you would have to do to get a reliable idea from the total—well say, more than 100 employees or whatever you want to pick?

Mr. **Delfico**. Mr. Snyder has written down 300 here at least. He is our economist and statistician, so I suspect we are looking at about 300 phone calls to companies or more.

Senator **Metzenbaum**. Thank you very much, Mr. Delfico, Mr. Snyder, Mr. Davis. I am sorry I do not know your name, but thank you, because I understand you did all the work.

Our next panel is a panel of three who have experienced a direct impact. You might call them the victims. Mr. Kenneth Lancaster of St. Paul, Minnesota, Robert Patterson of Rochester, New York, and Gerald Clay of Peoria, Illinois.

Mr. Lancaster, happy to hear from you first, sir.

STATEMENTS OF KENNETH LANCASTER, ST. PAUL, MN; ROBERT C. PATTERSON, ROCHESTER, NY; AND GERALD CLAY, PEORIA, IL

Mr. **Lancaster**. Good morning, Senator. My name is Kenneth Lancaster. I am from St. Paul, Minnesota, and I appreciate this opportunity to tell you what it means to suddenly lose your job after 13 years to a younger person, and not be able to do anything about it.

I was 25 when I came to North America as an immigrant in 1957, looking for a better way of life. I was born in England and I trained as an auto mechanic. I finished school at the high school level, and I worked for General Motors for 8 years as a service representative. In July 1971, at age 36, I was persuaded to leave General Motors by a Buerkle Buick company, a local service dealer in Minnesota, to become their service manager, which is the head of their service department.

During my 13 years with Buerkle Buick, I received numerous favorable reviews of my work, and in July of 1983, 6 months before I was terminated, I received a $3,000 merit salary increase for loyal support and performance. When I started working for Buerkle Buick, I was paid $9,600 annually, and when I left, my salary was almost $39,000.

At 4:30 on the afternoon of Friday, December 31, 1983, I was suddenly called into my office by the general manager of the dealership, and I was given an envelope containing two documents—one was a letter telling me I was fired immediately, and offering me severance pay in exchange for a release of all claims. The other was a letter of resignation. I was 53 years old. I was one year from being vested in my pension, and I had planned to work for Buerkle Buick until I retired.

Although I asked, I was given no reason for my termination. They had already hired someone in my place. I was told that I had to sign the release letter immediately in order to get the severance pay of one-half year's salary. I asked to take the documents home to review them, but they said no. I asked for time to take them to an attorney, but they said I did not need to because the dealership's lawyers had already gone over everything. I asked to speak to the owner, but they refused to let me speak with him.

Although I argued with them a bit, because they illegally tried to deny me the right to get unemployment benefits, the decision was final and would not be changed. I had lost my job for no reason I could understand or was told about.

During the meeting, I was called away to attend to an emergency in the service department, and while I was out there, the general manager came over and told them they would give me a year's severance if I agreed to sign the papers. I knew I was fired, they said they would redraft the papers over the weekend, but I still was not allowed to take anything home.

On January 4, 1984, the next working day after the New Year's holiday, the general manager came to my home with a new release letter, reflecting the increased severance and my right to unemployment compensation. However, they withheld $10,000 for a year to get me to help with an audit of my department and to make sure I did not sue them. This was something we had not talked about before, but I had no choice but to sign. The general manager told me if I did not sign right there and then, he would leave and I would not get any severance at all.

I was extremely depressed for a number of weeks. I was unsuccessfully looking for a similar position. In mid-February, one of my mechanics at the dealership told me that the fellow hired to take my place was inexperienced, he was only 28 years old. That was the first time that I realized that I had been discriminated against.

I contacted a lawyer, who informed me of the human rights law and helped me file a charge with the Minnesota Department of Human Rights. He thought I had a good case under Minnesota law and under the Federal Age Discrimination in Employment Act.

Buerkle Buick offered me $2,800 and some additional, small benefits to withdraw my claim. I decided not to accept this. I pursued the case in the courts and I ultimately lost.

The Federal trial judge said that I must have known what I was doing when I signed the release because I knew about the unemployment compensation laws. She also said that I should not be unhappy with the money I had gotten because after all, I was not destitute. The Court of Appeals agreed, and followed what they called contract law, not the equal rights laws.

Senator **Metzenbaum**. Is that a State judge or a Federal judge?

Mr. **Lancaster**. That was the State, sir.

Senator **Metzenbaum**. A Federal judge?

Mr. **Lancaster**. Yes, sir, the Federal District Court in Minnesota. I was told I had no right to sue. It is difficult for me to believe that an employee who works in America today, a free society, who has been a loyal and successful worker for one employer for a long time, can be fired from his or her job and forced to sign away their rights under the law without even being told about the equal rights laws, without having the chance to talk to a lawyer, without even knowing exactly what it is his employer is doing.

If I had known more about the equal rights laws, and had known on December 31, 1983, that my replacement was 28 years old, I would not have signed anything.

I know that the change in the law you are talking about today here will not change what has happened to me. However, I believe that employers should have procedures about hiring and firing that protect the rights of employees, as well as employers, and the rights of all employees should not be taken for granted. I thank you, gentlemen.

[Information supplied by Mr. Lancaster follows:]

BUERKLE BUICK-HONDA CO.

BUICK

3350 Highway 61 Phone 484-0231
ST. PAUL, MINNESOTA 55110

HONDA

January 4, 1984

Mr. Kenneth Lancaster
1905 Snelling Avenue
Falcon Heights, MN

Dear Ken:

After extensive study and consultation with recognized experts in the autmotive service business, Buerkle Buick-Honda Company has determined that it is in the best interests of the company to revise its entire service dpeartment operation, and to integrate the operation of the service department with related departments.

For this purpose, the company will be hiring a new service manager to implement the new system which has been adopted by the company. The new service manager has worked with this system in the past and comes to the company with the highest recommendations.

The company has determined that your services will no longer be necessary and the company will enter into a termination agreement with you as follows:

1. The company will pay to you a sum equal to your 1984 salary, or $ 38,972.50 as follows:

a) $ 29,229.37 upon the execution of this letter agreement.

b) $ 9,743.13 on December 31, 1984.

9743.13
+ 488.44
10,231.57

2. In consideration of the foregoing:

6,476.87

a) You agree to participate and assist Buerkle Buick in any audit of the service department or related department by General Motors Corporation or Honda Corporation.

b) You will not disclose to any competitor of Buerkle Buick any of the trade secrets or confidential information that you had access to during your employment with the company.

Mr. Kenneth Lancaster
January 4, 1984
Page Two

Nothing herein shall limit your right to work for a competitor of Buerkle Buick.

c) You hereby release the company, its officers and employees from each and every claim of any kind which you may have, or hereinafter may have resulting from your termination of employment by the company, ~~including any right which you may have to file for unemployment compensation~~. DEC

If the foregoing is acceptable, please sign on the line indicated below.

Dave Calderwood
Dave Calderwood
General Manager

I accept the foregoing terms and conditions.

Kenneth Lancaster 1/4/84
Kenneth Lancaster

based on 3295.00 Per month and adjusted on end of year check
D Calderwood

Senator METZENBAUM. Thank you very much. As I understand it, you were never told to consult a lawyer. In fact, you were told you could not consult a lawyer? You were given four days within which to act, and there was no mention of the ADEA? The fact of all of that would be invalid under our bill.

You say that the Federal judge said to you that since you were not destitute that that was a factor in the case; is that my understanding?

Mr. LANCASTER. I take it that way, Senator, based on the fact that it was the legal company of the Briggs and Morgan who were the defense attorney for my employer and asked for a summary decision in District Court after the Human Rights Department had contacted the dealer, and we had decided to sue. And that was the decision, a judge, Diane Murphy rendered the final decision on that basis. Those were some of the comments in her write-up.

Senator METZENBAUM. I have a little difficulty in getting this concept of the fact that you were not destitute——

Mr. LANCASTER. I have also, I do not know what that has to do with it. Does it mean that you have to be destitute to sue? If you are——

Senator METZENBAUM. Did she say it orally, or did she put it in her opinion?

Mr. LANCASTER. It was in her opinion. I believe, it was in her opinion.

Senator METZENBAUM. The next time the Federal judges come before us for a salary increase over the $89,500, I may raise that point with them. Do you have to be destitute to get some——

Mr. LANCASTER. I did not really know what that had to do with it.

Senator METZENBAUM. Mr. Lancaster, do you feel that you had a fair chance to consider the terms of your termination agreement?

Mr. LANCASTER. No, sir.

Senator METZENBAUM. You changed the agreement to protect your right to unemployment compensation. Why did you not also raise the question of the age discrimination at that time?

Mr. LANCASTER. I was unaware of the bill as far as its association would be on the contract and if I did not sign, I had been told the contents of the letter would say you are fired, we have hired another man, and we no longer need you. If I had not signed I would not have gotten the money.

Senator METZENBAUM. Thank you, Mr. Lancaster, you make a very telling case.

Next we will hear from Mr. Robert Patterson of Rochester, New York.

Mr. PATTERSON. Mr. Chairman, Senator Jeffords, my name is Robert Carl Patterson, and I live in Rochester, New York. I have been a tool designer and design draftsman for 34 years. I began working for Xerox Corporation in June 1967.

On November 1, 1982, I attended a meeting for my building's engineering personnel. During this meeting we were told that Xerox was making a voluntary reduction in force offer to those employees age 51½ and older who had at least eight years' service. The offer was for early retirement and would be available for the next two weeks only.

After the meeting, the head of our drafting department handed another draftsman who was 61 and myself age 55, copies of fact sheets on the voluntary reduction in force offer or VRIF, as it was known for short.

That evening my wife and I discussed the VRIF offer briefly, and we immediately decided as we had in the past in earlier VRIF's that we could not afford to take the VRIF. I did not want to take it, and I would not apply to take it.

The fact sheets that I had been given stated that employees who wished to submit a formal request to take the VRIF were to contact their manager. I did not do so. Two days later on November 3rd, my manager came into the drafting room and sought out the 61 year old draftsman and myself. He asked if we had received the fact sheets on the VRIF. His appearance in the drafting room was such a rare occurrence that it immediately raised suspicion in the minds of the other draftsman and myself. The draftsman asked our manager, who is on the layoff list. Our manager replied, no one is on the layoff list. This VRIF is up to each individual. The other draftsman persisted and said that there had always been such lists in the past when there were VRIF's. Our manager kept saying no, it is all voluntary.

We suggested he check with his boss about a potential layoff list. That day at 4 p.m., our manager went to see his boss and asked him if there was a layoff list. After our manager insisted his boss finally showed him the list. The next morning on November 4th, our manager came into the drafting room and red-faced told the other draftsman and me that there was indeed a layoff list. He then asked the other draftsman to come to his office. When he came back looking very angry and upset, he told me that our manager wanted to see me. My manager told me that I was on the layoff list and that I should seriously consider early retirement.

I went back to the drafting room in a state of shock, as my buddy, the 61 year old was in shock, and learned the other draftsman had been told the same. A half hour later, wanting to be absolutely sure I understood what my manager had told me, I went back to his office and asked him, "If I do not volunteer for the VRIP, what chance will I have of being laid off?" My manger replied, "There is a 99 percent sure chance you will be laid off."

I was now faced with a choice of two evils. If I applied for the VRIF I would be guaranteed 15 months' extended salary and retain my medical and dental coverage as a retiree. If I was laid off, I would only receive a maximum of 12 months pay and no coverage. My wife and I decided I had no other choice but to take the VRIF.

The deadline for applying for the VRIF was November 15, 1982. On that date, I submitted the request form to apply for the VRIF. The very last sentence on this form was a waiver of all claims against Xerox. I seriously considered signing the request form, signed under protest, as I felt I had been coerced into applying for early retirement.

But I decided against doing so. Xerox had reserved the right to deny any employee's request for the VRIF. If I had signed the request form under protest, then Xerox could simply have refused to accept my request. They would then have been free to terminate me under the involuntary reduction in force which my manager had warned me was pending. I could not afford to make this protest.

After I left Xerox, I learned that my department had hired three contract draftsman. On June 22, 1983, I filed a charge of age discrimination against Xerox with the EEOC office in Buffalo, New York. Two months later, when there had been no attempt at reconciliation by the EEOC or Xerox, I joined a class action age discrimination suit against Xerox which had been initiated by four terminated Xerox salesmen in March 1983. On October 6, 1983, I became one of the named plaintiffs in this lawsuit. A Federal court judge recently ruleu against the class action status, but the case of the 13 named plaintiffs, of which I am one, is expected to go to trial in September 1989.

Since November 30, 1982, I have either been unemployed or underemployed. I applied to nearly 200 firms, many of them repeatedly, in the past six years. In order to live, I have been forced to take unskilled, menial jobs at near minimum wage. I have been a cook, a bank courier, a laborer, a substitute industrial arts teacher, and an overnight aide in a cerebral palsy residence. There I had to wash floors, wash bedding, make breakfast, help the residents dress, and give out medication. I have worked since I was 11 years old and I had to go on unemployment insurance for the first time in my life.

Finally, last July I was hired at the age of 61, by Crossman Airguns as a tool designer. Until then, I found that no one seems to want to hire anyone over the age of 50.

There was nothing voluntary in the true sense of the word in my applying for the VRIF and thus signing the waiver at the same time. No one would willingly give up, at the age of 55, a job paying $32,000 a year with four weeks' vacation, 12 paid holidays, and a $121,000 life insurance policy, all this in exchange for an early retirement pension estimated by Xerox at that time to be approximately $270 a month.

Congress needs to take vigorous action to see that the EEOC protects older workers from age discrimination. It also needs to protect workers from being forced into signing a waiver of their rights as I was. I had only 7 working days in which to make a decision that turned my life upside down for the worst. The waiver was part of the VRIF application and, if I signed for one, I was signing the other. No worker should have to make such a decision. I will strongly urge the passage of S.54. Thank you.

[The prepared statement of Mr. Patterson follows:]

PREPARED STATEMENT OF MR PATTERSON

Mr. Chairman and honorable members of the Subcommittee:

My name is Robert Carl Patterson and I live in Rochester, N. Y. I have been a tool designer and design draftsman for thirty-four years. I began working for Xerox Corporation on June 26, 1967 and my final position there was as a Senior Design Draftsman in Plant Engineering and Maintenance in Webster, N. Y.

On November 1, 1982, I attended a general meeting for my building's Engineering personnel. During this meeting we were told that Xerox was "providing those employees who may currently retire or bridge to retirement the opportunity to pursue a Voluntary Reduction in Force." This VRIF plan only applied to persons with at least eight years' service and who were age 51½ or older. After the meeting, the head of our drafting department handed another draftsman who was 61 and myself, age 55, copies of information sheets on the VRIF. We had not asked for this information.

That evening I told my wife what had happened. We discussed the VRIF plan briefly and immediately decided (as we had at the time of earlier VRIFs) that I did not *want* to take the VRIF, I could not *afford* to take the VRIF, and that I *would not* apply to take the VRIF.

The fact sheets that I had been given stated that "Employees... who wish to submit a formal request to participate should contact their Manager..." I did not want to participate so I *did not* do so. Two days later, on November 3, 1982, my Manager came *into the* drafting room and sought out the 61 year old draftsman and myself and asked us if we had received the fact sheets on the VRIF. His appearance in the drafting room was such a rare occurrence that it immediately raised suspicion in the minds of the other draftsman and myself. The other draftsman asked our Manager, "Who is on the layoff list?" Our Manager replied, "No one is on a layoff list. This VRIF is up to each individual." The other draftsman persisted and said that there had always been such lists in the past when there were VRIF offers but the Manager kept saying, "No, it's all voluntary." We suggested he check with higher management about a potential layoff list. That day, at 4 p.m., our Manager went to see the top manager in Plant Engineering and Maintenance and asked him if there was indeed a potential layoff list. After our Manager insisted, the top Manager finally showed him the list.

The next morning, November 4, 1982, our Manager came into the drafting room and, red-faced, told the other draftsman and me that there *was* a layoff list. He then asked the other draftsman to come to his office. When he came back, looking very angry and upset, he told me our Manager wanted to see me. My Manager told me that I was on the layoff list and that I should "*seriously consider early retirement*." I went back to the drafting room in a state of shock and learned the other draftsman had been told the same. One-half hour later, wanting to be *absolutely sure* I understood what my Manager had told me, I went back to his office and asked him, "If I don't volunteer for the VRIF, what chance do I have of being laid off?" My Manager replied, "There is a *99% sure chance* that you will be laid off."

I was now faced with a choice of two evils. If I applied for the VRIF, I would be guaranteed 15 months' extended salary and retain my medical and dental coverage as a retiree. If I was laid off, I would only receive a maximum of 12 months' pay and no medical and dental coverage. At our age, the medical and dental coverage was vital for me and my wife, and we definitely needed the extra 3 months' pay while I tried to find another job at age 55. My wife and I very reluctantly decided that I had no other choice but to take the VRIF.

The deadline for applying for the VRIF was November 15, 1982. On that date, I submitted the form to apply for the VRIF. The very last sentence on this form stated: "If this request is accepted, I release all claims I may have against Xerox except any claims I may have that Xerox failed to perform the terms and conditions of their VRIF Program." I seriously considered signing the form, "Signed Under Protest", as I felt I, and the other draftsman, had been coerced into applying for early retirement, but I decided against doing so. Under the terms of the VRIF offer, Xerox had reserved the right to deny any employee's request for the VRIF. If I had signed the form "Under Protest", then Xerox could simply have refused to accept my request. They would then have been free to terminate me under the Involuntary Reduction in Force which my Manager had warned me was then pending. I could not afford to make this protest.

After I left Xerox, I learned that my department had hired three contract draftsman. On June 22, 1983, I filed a Charge of Age Discrimination against Xerox with the EEOC office in Buffalo, N. Y. Two months later, when there had been no attempt at reconciliation by the EEOC or Xerox, I joined a class action age discrimination suit against Xerox which had been initiated by four terminated Xerox salesmen in March 1983. On October 6, 1983, I became one of the named plaintiffs in this lawsuit. A federal court judge recently ruled against the class action status, but the case of the thirteen named plaintiffs, of which I am one, is expected to go to trial in September 1989.

Since November 30, 1982, I have either been unemployed or underemployed. I applied to nearly 200 firms (many of them repeatedly) in the past six years. In order to live, I have been forced to take, when I could find them, unskilled, menial jobs at near minimum wage. I have been a cook, a bank courier, a laborer, a substitute industrial arts teacher, and an overnight aide in a cerebral palsy residence. There I had to wash floors, wash bedding, make breakfast, help the residents dress, and give out medication. I have worked since I was eleven years old and I had to go on unemployment insurance for the first time in my life! Finally, last July I was hired, at the age of 55, by Crosman Airguns as a tool designer. Until then, I found that no one seems to want to hire anyone over the age of 50.

There was nothing "voluntary" (in the true sense of the word) in my applying for the VRIF and thus signing the waiver at the same time. No one would willingly give up, at the age of 55, a job paying $32,000 a year, four weeks' vacation, 12 paid holidays, and a $121,000 life insurance policy in exchange for an early retirement pension estimated at that time to be approximately $270 a month! Congress needs to take vigorous action to see that the EEOC protects older workers from age discrimination. It also needs to protect workers from being forced into signing a waiver of their rights as I was. I had only seven working days in which to make a decision that turned my life upside-down for the worst. The waiver was part of the VRIF application and, if I signed for one, I was signing the other. No worker should have to make such a decision.

I strongly urge passage of S. 54. Thank you.

Robert C. Patterson

From

Subject

Date

REQUEST FOR VOLUNTARY
REDUCTION IN FORCE

I am requesting that I be allowed to terminate my employment with Xerox Corporation under the terms of the Xerox Voluntary Reduction In Force Program. I understand that I will receive Voluntary Reduction In Force benefits according to the terms of the 11/82 Fact Sheet for Employees provided to me. I have read carefully and understand the Fact Sheet and agree to all its terms and conditions. It is understood that the Voluntary RIF effective date will be no later than November 30, 1982. I understand that in all cases, including my own, the decision to approve or reject this request is within the sole discretion of Xerox Corporation.

I further understand that, should this request be approved, I will not be eligible for re-employment by Xerox Corporation until a break in my Xerox service has occurred, defined by Xerox as two or more service anniversaries after release of my profit sharing funds. If this request is accepted, I release all claims I may have against Xerox except any claims I may have that Xerox failed to perform the terms and conditions of their VRIF Program.

Manager Approval

Robert C. Patterson
Employee Signature

Department Head Approval

Design Draftsman
Title

F.O.
Organization

Personnel Manager Approval

Senator METZENBAUM. Thank you very much, Mr. Patterson. Very telling, strong testimony. When and how did you first learn that Xerox had hired draftsmen to replace you, and how old were those draftsmen?

Mr. PATTERSON. I had occasion to go out to Xerox to see my buddies because I worked there 16 years. I knew a lot of people and I asked my boss for a letter of recommendation. And he said, yeah, come on out, I want to see you anyway, I want to see how you are doing on retirement which was, in my opinion, forced retirement. So I went out and I saw this one guy, that is one draftsman that I had seen there before as a contractor.

So I looked I said, hey Bill, what are you doing here, when did you come back. He said, oh, I have been here about a week. And I knew his age from knowing him from before. He was 35. So we talked a little bit and then he told me that another young friend of his was coming in from Syracuse as a contractor, a young kid. I said, oh yeah, how did you know him. I know him, he is a friend of the family. I said, a young guy. He said, yeah, he just got out of school. I found out later he was 21.

So this perked up my curiosity. Of course, we were suspicious that we were not thrown out because of lack of work, there was plenty of work to be done. The 61-year old guy behind me had a full workload and I had a full workload up until the last day we left. So about a month later, my curiosity was up and I called this same guy again and was talking to him, and he mentioned that there was a third guy there. And I said to him, who is that, and he mentioned his name and I had heard of this guy, and I knew he was in the early 30's, he was probably 33. He was a contract draftsman, and they were there about 6 months. I found that out later. One was 35, one was 33, and one was 21 or 22.

Senator METZENBAUM. If you had known at the time about Xerox's treatment of other older workers, would you still have signed the waiver?

Mr. PATTERSON. At the time I had no idea or no one had any idea what was going on. Everything was done in such a hurry. Everybody was in such a mixed up state of mind.

Senator METZENBAUM. Why did it have to be done so promptly?

Mr. PATTERSON. This was what they came out with at the meeting. These were the rules that you had to sign up by the 15th of the month. And it was the 4th of the month, it was on a Thursday when our manager told us that we are on a layoff list and you better do it or you are going to get thrown out anyway. That is the size of it.

Senator METZENBAUM. Up until that time, had you thought that Xerox was a particularly good place to work?

Mr. PATTERSON. Oh, yes, I had no complaint with Xerox. It is a good company to work for, good salary, good benefits. I had no complaints about Xerox.

Senator METZENBAUM. Was there any indication that you had not been giving them a full day's work, quality work?

Mr. PATTERSON. No, sir. I always got good reviews. I made perfect attendance award three years in a row. I always got good reviews. I always got good raises, 9.38, 8-1/2, whatever. Never turned down for a raise. No.

Senator **Metzenbaum**. Do you think we better change the law to protect people such as you in the future?

Mr. **Patterson**. I certainly do, Senator.

Senator **Jeffords**. This is a very difficult area that we are involved with in situations like yours to try and figure out what the public policy ought to be is also very difficult. Obviously, at least it has been traditional that a company has the right to hire and fire those that they desire to do so.

Taking what you are saying basically, if you just did not use age as an element, if you used seniority or you used capabilities and that sort of thing, you probably would agree that you would not have much of a leg to stand on with respect to arguing that you should not go. In other words, if you were there only two years and they let everyone less than two years go, regardless of age, there would not be a problem.

My question though is for a company's perspective and for the employee's perspective, if they provide an incentive program using an age element in it, such as that if you are over a certain age, you will get additional compensation for leaving, and they eliminate the seniority aspects and competency aspects, is that just bad per se, by itself, trying to in a sense to entice somebody to go?

Mr. **Patterson**. I think it is bad because I think I understand your question. Many of us are still active and good and experienced and honest straightforward good workers and always show up on time and are there and want to do a good job. We really do not want to have anything to do with a lot of this early retirement bit at all. I am 61 now, and I am active and healthy and I am working as a—they are very happy with me at Crossman Airguns as a tool designer. I disapprove of the whole bit of throwing older people out and for the life of me cannot figure out why this is going on.

Senator **Jeffords**. Or even enticing them out?

Mr. **Patterson**. Yes, yes. There is rationale for that, I mean, if it is a very healthy settlement, but do you consider $270 a month—that is not very much. Right now I got it raised up to $388 a month. Now that is not great. $89 a week I have in retirement. That is not very good, Senator. I should still be there working. I would like to still be there working.

Senator **Jeffords**. I understand that, and I understand the problems. I am over 50, so I understand, and my friends obviously many of them are over that age and the difficulties that people over 50 have getting jobs is certainly a very relevant factor. But suppose you were to be let go as you might, I am not saying you were, but because you had not been there enough years and then but you were given perhaps the option of removing yourself from the probable list by an additional incentive because of your age, to get the $270 a month; was that a legitimate offer to an individual, or do you think that that ought not to be allowed either because you are going to end up being unemployed?

Mr. **Patterson**. I think when these things come up a person should be given, number one, plenty time to go over and talk over with his wife, if he suspects anything at all which a lot of us did not, because where we were like babes in the woods, we had never been through anything like this. But if he suspects anything, to be able to talk to a lawyer and get some other opinion. I do not know if I can truthfully answer your question, because everything happened so fast.

Senator **Jeffords**. I understand, these are not easy questions, I am just trying to get a little of your own feelings, having been through this as to how you would have felt under those circumstances.

Mr. **Lancaster**. Senator Jeffords, may I interject one thing.

Senator **Jeffords**. Yes.

Mr. **Lancaster**. I was fired immediately with no prior warning. My incentive package ceased immediately. I was offered nothing, only my right to file. They denied my right to file for unemployment. The reason I contested that was that I was aware from firing and hiring in my department that you could not deny anybody the right to file for unemployment if you fired them. My insurance, however, I was allowed to maintain, the company paid it for three months, then I must pay it. My insurance went from $36 that they withheld from my pay stubs, twice a month, from $36 a month to $265 a month for medical insurance.

To say the least today, I do not have any medical insurance.

So they say you do not lose anything, or will an incentive help you sign, I think if I had probably had that type of incentives that you have insurance paid for life which I did not have, mine was out the door now—immediately. That is different than given the few weeks to think about it or discuss it with an attorney. Not to make anybody any trouble or any problems in the work place, I still believe that the bill you have will certainly improve the law, will certainly give both sides a decent argument. And I do not think it will involve EEOC any stronger than they are involved today, and God knows some of their activities could be looked at and improved on, I am sure.

But it all gets back to money, and they say they want more appropriations to do this. I do not believe that strengthening this bill the way that you are looking at today will put any more of the burden on the employer than it will on the employee, and I think it will be good for human relations all around.

Senator **Metzenbaum**. I want to make a point that an argument may be made as to whether employer incentive programs are or are not contributing to the strength of the economy. I think you can take two sides in that. I think you can talk somewhat about whether you ought to have a right to do that, the other side is what is the burden that is thereby placed upon the rest of the community in connection with our senior citizens.

But the fact is this bill does not address itself to the rightness or the wrongness of incentive programs. It is not the incentive program itself that is the issue, but forcing the worker as a condition of retirement, to sign a waiver of his or her rights, and with waivers the lawfulness of the program just cannot be looked at.

And so I want to say that I think these two witnesses have been extremely impressive and I want to say to you Mr. Clay, you have got a strong level to come up to because they have been great. So I am expecting to hear equally great testimony from you, sir. Happy to have you with us.

Mr. **Clay**. Senator Metzenbaum and to Senator Jeffords and to Senator Heinz who I guess has left the room, I did not come up here to perform, so what they did was fine. What I am going to do is fine, and when I am done I am going back to Peoria. What I want to tell you is what happened to me and what happened to me should not happen to anybody.

I started working for Caterpillar in 1968 and I worked for Caterpillar from 1968 to 1985 and like some of these other testimonies, I saw my salary go up from $10,000 a year to over $65,000 a year in that period of time, and certainly I had a lot of good faith in my company. And what happened to me on July 11, 1985, when my supervisor called me in to tell me that I no longer had employment, that I was terminated, it was a very traumatic thing.

I was told though that if I would sign the waiver, I would receive some benefits and I would receive a year's salary. I was also told that this was not a negotiating kind of package, I had to take it or leave it. And when I asked my supervisor if my race had something to do with their decision to let me go, he emphatically said no. Your race did not have anything to do with it. At the time I really was not thinking about age. I looked younger than I really am, but I am almost 50 years old, but I just really was not thinking about age, to ask them about age.

But in the meeting as it pursued on a Thursday, and then that following Monday the entire company shut down for like a summer break for two weeks. Now I had from the 11th of July until the 29th, but that was a period of time in which the company was shut down. I had no access to my counterparts or any of the employees. I had no idea what happened to them, or whether or not they were given similar treatment.

So I was called by my supervisor, I think it was on the 28th or the 29th of July and told again, hey, if you do not sign this package you are not going to get anything, you are going to lose your benefits and you are going to be out the door. You do not have a job.

I also went to several offices within the company because at the time I had been in contact with several of the vice presidents because we worked together. And so I went to them to find out if there was any possibility of salvaging my job and they told me, well the decision has been made and you just have to leave or you have to sign the package or you have to leave without anything. So I signed on the 29th of 1985 the waiver, and I accepted the benefits.

But I would say about two months after that, I had a chance to go back to the company to make a presentation on re-powering because I had been involved in re-powering engines and they knew that and they asked me to come back to make a presentation to them, so that they could initiate another program on re-powering. So I did that and as I came back I could see all of these younger workers and some of the people I trained, some of the people that I knew, and of the employees, a younger white employee was actually in my office. I trained him; he was in my office. I did not know this. I thought all of these people had been laid off.

They told me initially that it was a fair program and I assumed that everyone who had less than 17 years, which I had, was probably given the opportunity to sign this package. So after signing the package I felt like maybe I had signed my rights away, but I also felt compelled to pursue the matter, because at the time I had no knowledge that they had discriminated against me in any way.

In fact, I asked them point blank, I said, are you discriminating against me in any way, and they said, no. So I had no knowledge, so I was compelled to sign the waiver rather than losing all of the benefits, and then going out on the streets with nothing.

So I filed the charge on December 1985 with the Human Rights Department of Illinois and my case is now before the Illinois Human Rights Commission. My former employer is also seeking dismissal of the case, claiming that I released any rights or claims I might have. They had a hearing in the summer of 1988 and the judge presiding over the case, ruled that I signed a valid agreement and that the case should be dismissed.

It is my strong belief that this bill that you have now before the Committee will certainly help in alleviating the kind of circumstances which occurred with me. Now I would like to add that I did not go to an attorney to discuss this matter, mainly because being at Caterpillar as long as I was there, I had been in the hiring and the firing capacity for all these years, I understood the ramification of the law. I did not understand it as much as I do now, because I have done quite a bit of study on it, but I understood the ramification of what I was signing.

But the fact that I had no indication of the wrong that they had done I had no information to give a lawyer. So I just went on and signed. It is my understanding that the bill presently before the Committee is an attempt to eradicate this kind of a problem of age discrimination, and I certainly respect Senator Metzenbaum and all those people who are for this bill, and I hope that what we have said here today will give you some idea of how critical this thing is. But by being inside of the corporation, a part of the structure of a large corporation, such as Caterpillar, which is now—at that time it was a $6 to $7 billion corporation—now it is a $10 billion corporation.

By being inside the structure, I want to tell you, Senator Metzenbaum, that there is no way that there can be a fairness between the employee, knowing what is coming down and what the employee may have done. There is an imbalance. There is a built-in imbalance. I know this because I was inside the corporation. I hired people. I fired people. I promoted people. There is an imbalance. And one of the reasons that there is an imbalance is because the corporation has time to plan terminations. But look at the employees. The employee has no time to plan. It is mostly a surprise. When all these fellows, including myself, got the notice, we were surprised.

Now anytime you people in the military, you know, any time you have the opponent in a surprise situation, it is an imbalance situation. And that happened to us. Not only are you struck by this, but you have no time to do any research. You do not have the resources, not the capacity to find out what may have come down wrong.

And number two, the reason this thing is unbalanced is because the companies have the ability to orchestrate and formulate a program which you are not appointed to. Now the orchestration is important because they can determine exactly when to present to you the program. For instance, they presented it to me during the two-week shut-down period. I mean, I had no one to go back to check to see who else got the similar treatment, and in most cases you are fine if you do some research.

Many of these programs were presented to the employee during December or during a period of time when the finances were of such that they really needed the money.

So when you say to them, take the money or leave with nothing, they almost have to take the money.

And the last point is the law. Very few employees are privileged to know the law as much as the company knows it. Therefore, there is an imbalance. Some of these people do not even know that there is a law which is against discrimination of the age, of the minorities, or whatever. They do not even know. They are not familiar with the law. And the companies are well schooled in the law and so there is an imbalance. And you cannot correct that imbalance. You can give a man three months, he still cannot correct that imbalance. Now that is important to know.

In my conclusion, I would like to say to you, this whole Committee has the right perception as to what happens to an employee. Now as far as the solution, that could be of some discussion. Now I would like to leave this with you. Take the burden of proof and put it on a corporation, and, that is, if they want to use a document such as a waiver, then force them to come up with another document—the corporations now—to come up with another document that says that they have not discriminated against that individual and allow them to illustrate why they have not discriminated against that individual. Now that would take the EEOC out of it. They will not have to supervise it, if they have those two documents.

Now this does two things. At least it does one thing. It allows the corporation to assess what it is really doing. Now many of these corporations have taken this waiver and allowed it to be used in a very irresponsible way. If you can get a man to sign the waiver, you can do just about anything with him because he has no rights. You have taken his rights away. So many of the corporations have done that. Now what I would like to do is to say to you, this is my testimony to you and I am done.

[The prepared statement of Mr. Clay follows:]

PREPARED STATEMENT OF GERALD CLAY BEFORE THE SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES OF THE UNITED STATES SENATE

In 1968 I began my employment for the Caterpillar Tractor Company. I worked continuously for that company through the summer of 1985. In July of 1985 I was employed in the Product Support Department of the North American Commercial Division of Caterpillar Tractor Company in Peoria, Illinois.

On the morning of July 11, 1985 my supervisor requested that I confer with him. During our conference he explained to me that effective July 29, 1985 I would be terminated as an employee of the company as a part of a general reduction in its work force due to a reorganization of the company. I was also informed that I would be entitled to receive severance pay benefits in the approximate sum of one year's salary together with certain other benefits provided that I signed by July 29, 1985 a document releasing any claims I might have against my employer. My supervisor told me that I had two choices available to me. I could either sign the release within the prescribed time and receive the separation benefits offered by my employer or chose not to sign the release and lose any entitlement to those benefits. I was not afforded the opportunity to negotiate the separation pay package and it was made clear to me that its terms were non-negotiable. I asked my supervisor at that conference if either my race or the quality of my work had played any part in the company's decision he assured me emphatically that neither was a factor in the company's decision.

The meeting conducted with my supervisor occurred on a Thursday. Beginning the following Monday and extending through July 29, 1985 the Peoria manufacturing facility was closed due to a plant-wide summer shut-down. During that time period most of my counterparts in the company were off of work due to that shut-down. Accordingly, during the interval between the time I was informed of the company's actions and the deadline for signing the release and receiving the separation pay benefits I did not have the opportunity to explore what individuals received treatment similar to mine and which of my counterparts were not victimized by the reduction in force. During the time period between July 11 and July 29, 1985 I spoke with several officers of my employer to ascertain whether any opportunity was available to save my position with the company. During these conferences I was told that neither my race nor my age had played any part in the company's decision. One officer strongly encouraged me to sign the release rather than leave the company with nothing. On either July 28 or July 29, 1985 I received a telephone call from my supervisor. He informed me that if I did not sign the release prior to 6:00 p.m. on the evening of July 29, 1985 the company's separation pay benefits offer would be withdrawn.

During the years that I had worked with Caterpillar between 1968 and the summer of 1985 I had not developed any perception that my employer had evidenced any biases against me either because of my race or age. During the time period I had to consider the options of signing the release I had no information available to me which indicated to me that my age was at all a factor in the company's decision to terminate my employment. Although I could have consulted with a lawyer during that time period I felt I had no information to present to the lawyer which would be helpful to him in determining whether I had been the victim of any improper treatment at the hands of my employer. I signed the release on July 29, 1985 because at that time I had no facts which would indicate to me that I had been the victim of any discrimination on account of my race or age and I felt if I did not sign the release I would lose completely any entitlement to severance pay.

Several months later I visited my old workplace. At that time I observed younger, white employees with less work experience than I who were still working and had not been impacted by the force reduction. I could perceive no meaningful reason why the company would have selected those individuals to remain on the work force instead of me except for either my age or my race. It was at that time that I first perceived that the company's treatment toward me was related to either my race or age. In the event I had some perception in July of 1985 that my employer was treating younger employees in a preferential fashion to its treatment of me I would not have signed that release.

In December of 1985 I filed a charge of employment discrimination before the Illinois Department of Human Rights. My case is now before the Illinois Human Rights Commission. My former employer is seeking the dismissal of my case claiming that I released any rights or claims I might have against it. In the summer of 1988 hearings were held with respect to that issue. Recently, the administrative law judge hearing that case has decided based upon her interpretation of present law that notwithstanding the circumstances giving rise to me signing the release it is valid and bars me from prosecuting further my claim and has recommended the dismissal of my claim.

It is my belief that my employer improperly treated me in the circumstances surrounding me signing my release because the time made available to me prior to signing the release and the particular circumstances at my place of work prevented me from having reasonable opportunity to form any responsible perception that I might have an arguable claim to raise against my employer. It is my understanding that the bill presently before this committee is an attempt to eradicate that type of injustice for persons covered by the "Age Discrimination in Employment Act". As a victim of the evil which is sought to be corrected by this legislation I respectfully ask this committee to favorably approve and recommend the passage of this bill into law.

STATEMENT ON THE
SPECIAL SEPARATION BENEFITS

Name G. CLAY Social Security No. ____________

Separation Date JULY 31, 1985 Ident. No. ____________

This will certify that I will be provided with special separation benefits made up of the following items:

1. I will receive a $ 65,926 single sum payment from the Company which is equal to 12 months salary at my base salary rate. Deducted from this amount will be any applicable tax withholding and any amounts owed to the Company.

2. My Basic Life Insurance of $ 131,952 and the Caterpillar Medical Benefit coverage for myself and eligible dependents will be continued past my separation date for the number of months used in calculating the single sum payment.

   Optional Life Insurance (if any) and disability benefits will cancel as of the end of the month in which my separation occurs.

3. If I request, I will be provided with Job Placement Assistance as arranged for by the Company with the Company paying 100% of the agency fee.

4. The regular pension plan provisions will provide me with a vested pension of $ 1323 per month payable at age 65.

In consideration of receiving the special separation benefits as described above, I release and forever discharge Caterpillar Tractor Co., and its subsidiaries, of and from any and all claims, causes of action, damages and liabilities whether or not known, suspected or claimed by me which I may have relating to my separation from active employment, or which are related to any act, course or thing which could have been alleged in any action based upon such separation.

I have read the above and understand the items described in this statement, including the releases.

29 July Gerald Clay

Date Employee

NOTE: Employee to sign two copies and keep one for own file.

Senator **Metzenbaum**. Thank you. Your testimony was very good and very helpful. Let me ask were you the only one who was asked to sign a waiver, or were a number of others asked to sign a waiver?

Mr. **Clay**. No, sir. I am not the only one. There were a number of others asked to sign a waiver, but keep in mind I know about my situation, like Mr. Patterson here, my evaluations were always in the top two-thirds of the management group. I cannot speak for the other people, because some of them I know were below average. And so they probably had a reason for accepting it.

Senator **Metzenbaum**. Do you think that generally the layoff was based upon age?

Mr. **Clay**. In this case, yes. I think the layoff was generally based upon age and in my case, probably age and something else. I do not know. I think age—in fact, there is a major lawsuit with the corporation on behalf of those people who were laid off.

Senator **Metzenbaum**. Thank you very much, Mr. Clay. You met the challenge of giving us as good a presentation as these two men did. Senator Jeffords?

Senator **Jeffords**. Not to say more so, but I think your suggestion at the end is an excellent one, and may get us out of some of the dilemmas we are in. One of my concerns is that if we get through with this, and what we do is end up with no companies offering any incentive programs, or if it ends up in a reduction of what otherwise might be offered, I am not so sure we would have accomplished much.

One of the great problems we have is the time delays which may be incurred by requiring a preexamination by EEOC of everyone. Your suggestion that if they sent a document that is certified that they had done all of these things and there would be a pre-approval on that, and then if it was found that they had not, then they would be liable for sanctions. It might get us out of a very substantial dilemma, and I thank you for that very excellent suggestion.

Mr. **Lancaster**. Senator, again the problem that I have with these two gentlemen is one which the Caterpillar is a monstrous company and the Xerox is a large conglomerate. My company represents less than 150 employees. And that is large compared to some that are indiscriminately not advised of the law on age discrimination. And there are people in this room that work for the Government or whatever, and they have their protection levels, but there are thousands and millions of people out there that are not informed, and I think it is up to an employer with criteria representative of the law to inform that employee.

Senator **Jeffords**. That would be one of the requirements.

Senator **Metzenbaum**. Thank you very much. I might say to my colleague, Senator Jeffords, that you mentioned that if they signed such an agreement that they had not discriminated and then they would be subject to sanctions. I have a hunch that you're opening a Pandora's box because every time you get into sanctions maybe we cut off all Government contracts from them or something of the kind or do some other things, and I have a feeling that if we went down that road, you might find it far more distasteful than the actual bill.

Senator JEFFORDS. Either give a different view or whatever you might say, Mr. Chairman, what I am concerned about is your earlier testimony that may require a year's delay before you can get approval if you require pre-investigation, and that certainly would make it very difficult, if not impossible, to have any attractive plan. Whereas, if we make sure that they have established their criteria, the sanctions could well be the ability to be able to pursue private remedy or whatever else. So you are not talking about the kind of sanctions that just end your contract.

I am trying to get us into a situation where we do not end up with no incentive programs because we created so many barriers to their utilization. I think they do have some utility, that is all.

Senator METZENBAUM. Let me just respond briefly and say that do not forget that three-quarters of the employers do not use waivers. And I think that is a very significant fact. Three-quarters do not. Why do the other 25 percent have to. Having said that gentlemen, thank you very much. Your testimony has been extremely helpful.

Senator METZENBAUM. Our last panel consists of Mr. George Galland, firm of Davis, Barnhill and Galland of Chicago, Illinois; Ms. Mary Gardiner Jones, Secretary of the Board of Directors, the Older Women's League of Washington, DC; Mark S. Dichter of Morgan, Lewis, Bockius of Philadelphia, Pennsylvania; and Cathie Shattuck of Epstein, Becker and Green of Washington, DC.

I just want to ask the three attorneys who I believe are testifying in their own behalf, a preliminary question. I think those three know who you are, of course, and that is have you been retained by any civil rights group or trade association or business for the purpose of commenting on or proposing any legislation? Or have you had any discussions with any such organizations about being retained to comment on or propose changes in S. 54?

And I might say in a prefatory statement that certainly you may have had such statements or comments and discussions, and there is nothing illegal about that, but if you were here in some way other than your own personal capacity, we would at least like to know that fact.

So I guess I will ask each of you other than Ms. Jones that question. Mr. Galland?

Mr. GALLAND. Senator, I have not.

Senator METZENBAUM. Thank you, and Mr. Dichter?

Mr. DICHTER. No, Your Honor, I have not been retained, although I have had numerous discussions with all sorts of organizations, including the AARP, the EEOC, and employers and representatives of the plaintiffs on this issue.

Senator METZENBAUM. You represent the plaintiffs on this?

Mr. DICHTER. No, I represent employers generally, but in my capacity as co-chair of the ABA Equal Employment Opportunity Committee, I have been involved in numerous discussions on this subject. But I am not here representing any of those organizations.

Senator METZENBAUM. Have any of your discussions been aimed at or discussed the matter of your being retained to oppose or comment on this bill?

Mr. DICHTER. No, sir.

Senator METZENBAUM. Thank you, and Ms. Shattuck?

Ms. SHATTUCK. I have also not been retained to comment on this bill. I do represent management, but have had extensive conversations with our clients, other clients, ABA people, members of various interest groups, including plaintiffs for——

Senator JEFFORDS. Mr. Chairman, if I may interject at this point, we requested Mr. Dichter and Ms. Shattuck to testify because we knew of their understanding of the issues involved from the management perspective, and that is basically why they are here today.

Senator METZENBAUM. We are delighted to have them here, and I do not mean to inferentially reflect at all upon your integrity, your credibility, your ability, or anything else.

Our first witness will be George Galland. I think you all know of our five minute rule.

STATEMENTS OF GEORGE GALLAND, OF DAVIS, BARNHILL AND GALLAND, CHICAGO, IL; MARY GARDINER JONES, SECRETARY, BOARD OF DIRECTORS, OLDER WOMEN'S LEAGUE, WASHINGTON, DC, ACCOMPANIED BY LAURE LOEB; MARK S. DICHTER, OF MORGAN, LEWIS, BOCKIUS, PHILADELPHIA, PA; AND CATHIE A. SHATTUCK, OF EPSTEIN, BECKER AND GREEN, WASHINGTON, DC

Mr. GALLAND. Thank you, Mr. Chairman. Mr. Chairman, Senator Jeffords, I am a lawyer in Chicago, Illinois, and I represent both sides of the fence in ADEA cases. I do a lot of work for plaintiffs, both in individual cases and class action cases. I also advise employers, and I have been general counsel to a major employer in Chicago, and I have had to deal with ADEA cases both specifically and giving them advice about early retirement. So I have been thinking about these issues for a lot longer than this bill or its predecessor bill has been around.

I do support S. 54, although I have one quibble with it which I will talk about in the end. And I support it for basically three reasons. Number one, I think that the bill or something very like the bill is necessary to put an end to the major unfairness that is created with waivers in early retirement or "voluntary" separation situations.

Number two, I think that the courts are not successfully solving this problem. They are trying hard, the EEOC likewise is trying, but they are not coming up with a solution which is either satisfactory for employees or employers. And we are having a lot of unnecessary litigation and waste of money trying to solve a problem that Congress ought to be solving.

And number three, I am not convinced that the side effects that some people fear from this bill ought to be taken that seriously. Starting with the question of fairness, I do not have much to add to what Senator Heinz had to say or what these witnesses had to say about the major problem that confronts somebody when they are brought an early retirement incentive program. As these people put it better than I could, I think, they just do not know really the facts of any claim that they might have. The company has that information. They do not.

The company is not going to volunteer information to them about how they selected people for early retirement "offers." And they are not going to be given long enough, even for a capable lawyer to investigate the situation and find out whether the person has a viable claim. It is just too rough.

But there is another aspect of unfairness that these witnesses did not mention which I would like to bring to your attention. And that is in many situations, the employee not only does not know whether he has a viable age discrimination claim and cannot find out in the time he has to decide, but he also may not know what is going to happen to him or her if he says no. These three men have just testified as I listened to them, at least had some inkling or some rather definite inkling of what was going to happen to them.

But I have been involved in cases on both sides in which the person who has made the offer is not told exactly what will happen to him or her. Intimations are made that, well we would like to avoid layoffs and this is a voluntary plan to avoid layoffs, but they really do not know whether they are going to lose their job, whether they are going to get demoted, if they are going to get demoted, where they will end up.

If they are going to get offered another job, whether it is another job that they can do, whether it will be a job on the day shift or the night shift. They just do not know and they are not told. And so these employees are forced to make a choice at a time (a) when they really cannot evaluate whether they have a solid claim or not, but (b) also at a time when they may not know what the consequences are of saying no.

And those are two basic conditions which I do not think Congress intended that employees be faced with when considering whether to make a choice about early retirement, and I think that this bill for that reason alone, is necessary in order to keep employees who are in that kind of position from waiving their rights.

Going to my second point which is the way the courts and the EEOC have been dealing with this problem. I read every decision, as I am sure some of my colleagues who are management lawyers, or employee lawyers of any kind do, that comes down on the question of waivers. The decision that hit Mr. Lancaster is an extreme case. That decision is not typical of the decisions that are coming down on waivers.

What is really typical of the decisions that are coming down on waivers is courts who look at these waivers and say, these waivers make us uneasy. We are not going to rule them out all together, but we are going to scrutinize each one on a case by case basis. And then they have to say, what are the criteria we are going to use. And then they sound like the EEOC's proposed rule which Congress has punched in the nose each time it was laid down. They say, well, we will look at a whole list of criteria, but no one of these criteria will be controlling. We will look at the totality of the circumstances.

And there are a number of decisions which have come down, most recently a couple of cases from the Court of Appeals in Philadelphia which list these factors. And they say these are the things we will look at, but we want to make it clear that no one factor is overall controlling.

And the reason that they are unwilling to lay down a set of rules that are coherent rules is that is a very difficult thing for a court to do without legislative authority. Nobody has told these courts, you lay down a set of rules. That is the sort of legislative kind of job. And where that leaves us, whether you are a plaintiff or a defendant in these cases, is a situation in which you do not have any idea in advance whether a waiver is going to end up being enforced by a court or not, and where the most likely result is to leave it in the hands of a jury, which means a lot of litigation and which may be the major issue in the case is going to be, was this waiver enforceable or not.

I do not think that that situation is going to change. I do not think the courts are going to have the hutzpah, if you will, to legislate on an issue which is really for Congress to legislate on. And we are going to be left with uncertainty in the courts and any employer's lawyer, such as I am on occasion called upon to advise an employer whether these waivers are going to hold up is going to have to say, I do not know. And I think that that is undesirable.

And finally, I think that the side effects that I have heard talked about do not convince me. There are really three that I have heard outlined. Number one, is some people say that, well, if we cannot get waivers which are sort of generally enforceable or if this law is passed, employers are not going to pass early retirement programs and employees will be deprived of the benefit of those. I do not believe that for a second. These programs are still common without waivers. They always have been. And the truth of the matter is that anybody who has advised an employer knows that employers today will take actions even if they know they are going to be sued.

The unfortunate, but brutal fact is that taking an age discrimination suit is considered part of the cost of doing business in many situations. Many people will adopt early retirement programs even though they know they are going to be sued and even if they know they are going to have to pay some money, because the net benefit to the employer will still be favorable.

I do not believe for a second, and I do not think anybody seriously believes for a second that by passing this bill, employers are going to be deprived of the incentive of offering these programs to their employees. I do think that they may have a little bit more of a reason to make them fair, or to make them friendly. Avoid the kind of brutality that leads to most of these lawsuits. If people had treated Mr. Lancaster better or Mr. Clay better, I think they would have avoided a lawsuit.

And finally, it seems to me that the only criticism that I find at all possibly convincing of this bill is it might get in the way as presently drafted of certain kinds of high level industrial divorce agreements. If a president of a company comes to a parting of the ways with his board of directors and they want to give him a golden parachute or her a golden parachute, it does seem a little strange that he cannot waive his ADEA rights in the context of such an agreement. These are people who make hundreds and hundreds of thousands of dollars a year. They are big boys and girls, they can take care of themselves.

If the Congress is worried about inhibiting that kind of industrial divorce agreement, it seems to me it is easily handled simply by exempting high level, high paid, policy makers from the Act in the same way that we currently exempt them under a section of the law as currently written. I think with that kind of minor amendment of the bill that side effect would take care of them.

[The prepared statement of Mr. Galland follows:]

STATEMENT OF GEORGE F. GALLAND, JR.

TO THE SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES, UNITED STATES SENATE

March 16, 1989

My name is George F. Galland, Jr. Since 1973 I have been a lawyer in private practice in Chicago. Much of my practice consists of representing both employees and employers in matters involving the Age Discrimination in Employment Act of 1967. I have represented, and still represent, many employees in individual and "class" suits under the ADEA. I have also advised, and still advise, major employers on their rights and duties under the ADEA. I have served as General Counsel to the Chicago Park District, one of Chicago's largest public employers, and have advised other large private and public employers. Because I represent both sides in ADEA matters, I hope I can be helpful to this Committee as it considers the issues raised by the proposed ADEA Waiver Protection Act of 1989.

I support the proposed Act, although, as I will discuss, I suggest one modification. The thrust of the proposed Act seems sound to me for three reasons. First, the proposed Act is needed to put an end to the severe unfairness that is created when waivers are demanded of employees who are offered what purport to be "voluntary" incentive programs to retire or resign. Second, the present state of the law of ADEA waivers is confused and getting more so. The proposed Act should both clarify the law and reduce the amount of litigation over ADEA waivers. Third, I don't think that the proposed Act's restrictions on ADEA waivers will have the undesirable side-effects that some persons have suggested.

1. The Need to Protect Employees Against Having to Make Unfair Choices. I think the most important problem with ADEA waivers lies with waivers that accompany programs designed to obtain the retirement and resignation of employees. Such programs often look "voluntary," and are usually called such by the employer. Yet such programs are generally offered because an employer urgently wants to reduce its salaried workforce. Accordingly, programs labeled "voluntary" slide into pressure tactics. These range from brute threats of termination to subtle insinuations that if the employee turns down the "offer" he or she may later be on the street with no substantial benefits of any kind, or be downgraded to an unspecified job at an unspecified pay level. When that happens, the employee has a terrible choice. He can say no to the retirement offer and risk never getting it again. Or he can take the offer and sign away his ADEA rights through a waiver.

The trouble with this choice is that the employee usually has to make a waiver decision at a time when he does not know, and cannot meaningfully know, what the adverse effect will be of turning down the offer. (In fact, the "voluntary" packaging that employers usually give these programs is likely to discourage employees from looking into the adverse consequences of saying no.) Moreover, even if the employee does have some insight into what will happen, he cannot meaningfully evaluate at that time whether he has a viable ADEA claim, much less how much it is worth. To evaluate that, he needs extensive information on what the employer intends to do with his job duties, whether and how it plans to replace him, how it has conducted itself toward other persons subject to the "offer," and much other information. An individual employee simply does not have that information when the offer is made, and cannot get it during the limited times generally given by the employer to decide whether to take the offer.

In short, such employees are asked to waive ADEA rights even though (1) they usually lack information on what the consequence to them will be if they refuse to waive their rights, and (2) they cannot meaningfully evaluate the strength of the claim they are being asked to waive. I doubt that in passing the ADEA, Congress intended to allow employers to put their employees to such a choice as a condition of participating in retirement incentive programs. The proposed Act would go a long way toward protecting employees from having to make it.

2. Reducing Uncertainty and Litigation. I carefully follow the federal court decisions that have been coming down on the enforceability of ADEA waivers. To be blunt, without legislative help, the courts are floundering. They clearly distrust ADEA waivers, and repeatedly acknowledge the potential for abusing them. Yet they are rightly reluctant to legislate detailed rules for when to uphold them and when not to. After all, the ADEA says nothing on the subject, other than its

reference to the Fair Labor Standards Act, and the FLSA's provisions on waivers are themselves cryptic. Moreover, the common law of contract is no help. Its catch-phrase, "knowing and voluntary," is capable of almost any interpretation. So the courts retreat, and intone that the "totality of the circumstances" will be considered in deciding whether to enforce an ADEA waiver. They cite various "criteria," but quickly add that no one of them is decisive. The result is that each case is unpredictable, and good plaintiffs' lawyers usually have a fair shot at persuading a judge to leave the enforceability of ADEA waivers to a jury.

The proposed Act, in my view, will reduce this uncertainty, and reduce, if not end, the expensive, wasteful process of courts groping toward a set of common-law standards for ADEA waivers. The courts have no warrant for laying down precise rules on this subject. Congress does. The courts would be grateful in this area for help.

3. Side effects. I see two main side-effects the proposed Act might arguably have. First, by making it harder to obtain enforceable ADEA waivers, the Act might lead employers not to offer early retirement programs, which can be a plus for older employees. Second, the Act might inhibit employers from reaching "industrial divorce" agreements with high-paid executives.

Based on my experience, I am confident that the first side-effect will not happen. Early retirement programs abounded long before the relatively recent practice developed of requiring waivers. Many employers still do not require those waivers in their programs. When major employer clients of mine ask me about the risks of a waiverless early retirement program, I tell them that the best protection against getting sued under the ADEA is not waivers, but being fair, kind, and careful in running an early retirement program. Having represented many ADEA plaintiffs, I believe that most ADEA suits are caused because the employer acted brutally or unfairly. Most long-time employees love their companies and sue them only with reluctance. Moreover, in my view, getting waivers as part of an early retirement program can have a perverse effect. Waivers can encourage employers to try to get away with discriminatory programs, or to dispense with the effort to act fairly and humanely, because they wrongly think that the waivers will protect them from being sued.

I find the second possible side-effect -- inhibiting "industrial divorce" -- more plausible, and it is the source of my one criticism of the proposed bill as currently written. I think it is desirable not to discourage buy-outs by corporations of high-paid executives. Such buy-outs encourage mobility of management and are good for both sides if voluntarily entered into. Most such buy-outs include definitive releases on both sides -- a complete "industrial divorce." I would not like to see such industrial divorces inhibited by the ADEA.

The proposed bill, however, might have some minor inhibitory effect on such "divorces." As currently written, the proposed Act would require an actual age discrimination dispute to have surfaced in writing before a waiver of ADEA rights could be enforceable. In the usual "industrial divorce" situation, it is unlikely that the executive will have accused his employer of age discrimination, and the executive or the employer may not want their "divorce" agreement to refer to any such dispute even if one has arisen.

I am not sure that "industrial divorce" agreements will be much inhibited even if the Act as proposed is passed. Still, I think the Subcommittee should consider an amendment to the proposed Act that would have the effect of exempting "industrial divorce" situations involving high-paid executives in policy-making positions. Such persons -- as opposed to middle-management, medium-compensated men and women who have spent their entire careers with the company and have few options with other employers -- have relatively little need for protection against waiver abuses. If Lee Iacocca and Chrysler come to a parting of the ways, it seems odd to say that he cannot waive ADEA claims without accusing Chrysler in writing of age discrimination.

I have not fully thought through the best way to word such an exception to the proposed Act, and I am not sure just where to draw the definitions of who is high-paid and who is a policy-maker. Nonetheless, the ADEA already contains a compulsory-retirement provision drawing a similar line (see 29 U.S.C. section 631(c)), so that it would seem easy to draft a sensible provision that solves this problem.

Senator METZENBAUM. Thank you. It is my understanding you do represent both employers and employees.

Mr. GALLAND. Yes, sir. At the present time, I have clients of both natures on the issues involved in this bill.

Senator METZENBAUM. Thank you very much. Our next witness is Mary Gardiner Jones, Secretary of the Board of Directors, the Older Women's League.

Ms. JONES. Thank you, Senator Metzenbaum. I am being accompanied this morning by Laure Loeb, who is our Director of Public Policies, so if you direct any questions that I cannot handle, if you will permit me, I will ask Laura to pitch in for me.

Senator METZENBAUM. Thank you.

Ms. JONES. I am also a former Federal Trade Commissioner and I mention that because it gives me some feel for some of the issues that have been raised about administrative burden here and I just wanted to be able to address myself to those issues later on. My full statement is on file with you, so I will simply summarize it.

Senator METZENBAUM. The statements of all of the witnesses will be included in the record, as delivered.

Ms. JONES. Thank you, Senator. The Older Women's League is a grass roots organization. Our concerns are essentially for mid-life and older women and we have particular concerns and interests in employment issues.

We come here to support wholeheartedly this bill of yours. It is an essential, really critical bill for the older women in the work place today. We have not talked much about the women in the work place. Let me give you a picture of where they fit in this situation. There are 13 million women over the age of 40 who are in the work place today. And their number, as you well know, is increasing.

Women age 55 and over now make up four out of every 10 older workers, and this statistic has doubled since 1950. And yet despite the presence of older women, the large numbers of older women in the work place, it is white males who primarily are those who file claims under ADEA—83 percent of the claims are filed by white males. The remaining 17 percent are divided between minority males and all working women over 40.

Now it is clear that older women are not filing claims because they are not being discriminated against. We have enough evidence in our own office from the telephone calls, the inquiries we get from our members who are asking about issues that have happened to them which they think have been discrimination because of age, or they are not quite sure, or they are having problems. They want to know what their rights are. So we know that they are suffering from a lot of unfair discriminatory employment practices.

I think the main reason why women are not filing claims is they do not know their rights. Very few women, indeed, very few people, I think, know their rights under the law, and women I think too have a special disability in this area. Society tells women that to be old is bad. And women, I think, internalize a good deal of these feelings. They buy into this notion that the people do not want to work for women. They certainly do not want to work for older women. Older women are not serious about the work force. They are just working for pin money or they are too aggressive or they are not aggressive enough. You know the stereotypes that are played against women, and I think unfortunately we tend to buy into these.

And so that means that we are not going to, when we get confronted with a situation of an early retirement program and a waiver that we are told to sign, not usually asked, we are going to assume that it is. That is about all we can do and there is not much that we have that we can fight with and so women are, I think, more apt to be signing these kinds of waivers than almost anybody else.

Now we do a lot in the Older Women's League to try and sensitize our members to their rights. We have just produced a handbook called "Employment Discrimination Against Older Women," which is designed to help lawyers and people representing women understand just what their problems are. So we have a long history in this field.

It is our position that women must have the kind of protection that this law is providing them. There is no question that when a woman is faced with a kind of so-called choice of being terminated, laid off or given an early retirement, that she is going to sign that. And she is going to sign a waiver if that is pushed in front of her. And she is not going to know that that waiver could perhaps be a deprivation of her rights. She is going to take it very seriously. Women are not apt to be as sophisticated in legal matters as men, especially older women of this generation that we are talking about right now. And when they sign a waiver, they are going to assume that that is it. That they have done it.

So our position is that this bill is an absolute essential for protection of women and I do not understand, drawing on my FTC experience just why the EEOC seems to read into this law that it requires them to provide supervision or that it requires them to give any kind of pre-advanced clearance. Certainly FTC, we had an advisory opinion program which was voluntary, we offered it to business, we did not have to. It is curious that in many instances there were very few businesses that took advantage of that. But I simply do not understand the whole issue that has been raised here in terms of this burden that is going to be placed on them.

So in summary, Senators, it is our hope that this bill does in fact go through and that you will in fact make sure that all workers and especially women are not going to be presented with this kind of a waiver which they are going to take very seriously and not think that they have any rights.

[The prepared statement of Ms. Jones follows:]

OLDER WOMEN'S LEAGUE

NATIONAL OFFICE

STATEMENT OF THE OLDER WOMEN'S LEAGUE

IN SUPPORT OF S. 54,

THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989

BEFORE THE SUBCOMMITTEE ON LABOR OF THE

U.S. SENATE LABOR AND HUMAN RESOURCES COMMITTEE

ON MARCH 16, 1989

BY MARY GARDINER JONES,
SECRETARY AND MEMBER OF BOARD OF DIRECTORS
OF THE OLDER WOMEN'S LEAGUE

CHAIRMAN METZENBAUM AND MEMBERS OF THE SUBCOMMITTEE:

I am the Secretary and Member of the Board of Directors of the Older Women's League (OWL). I am also a former Commissioner of the Federal Trade Commission. On behalf of the Older Women's League, I thank you for the opportunity to express our concerns over the misuse of unsupervised waivers by employers wanting to reduce the size of their work force.

We believe that your legislation, S. 54, the Age Discrimination in Employment Waiver Protection Act, would protect the rights of older workers under the Age Discrimination in Employment Act (ADEA), while allowing employers to use waivers in those cases where in fact a bona fide negotiated settlement has been reached.

As the first national grassroots organization devoted exclusively to advancing the interests of midlife and older women, OWL is particularly involved with employment issues. Founded in 1980, OWL now has over 110 chapters in 36 states.

The purpose of our testimony is not to debate the existing case law, nor to argue statutory construction. Rather, we want the Subcommittee to understand first, how older women workers are adversely effected by the almost unlimited use of unsupervised waivers by some employers and secondly, how the EEOC is not protecting the rights of workers. Lastly, we will explain why we believe the Waiver Protection Act will adequately protect employers and employees alike.

I. The Adverse Impact of Unsupervised Waivers on Older Working Women

A. Currently Few Women Are Filing ADEA Claims

To begin, let me describe the current working environment for midlife and older women. Currently, more than 13 million women over the age of 40 are in the paid labor force, and their number is increasing. Women age 55 and older now make up four out of every 10 older workers. This statistic has doubled since 1950.

Despite this number of older working women, white males continue to file most of the claims under the ADEA. White males account for an outrageous 83 percent of ADEA claims. The remaining 17 percent of the claims are divided between minority males and all working women over 40, despite the fact that these women makeup well over 40 percent of the older work force.

Most definitely, this tilting of claims towards white males is not simply a coincidence. Several factors enter into this imbalance.

First, a majority of ADEA claims are filed by managerial and professional employees, who have the economic wearwithall to pursue these lengthy claims. These top level positions continue to be predominantly occupied by white males.

Although men earn more than women at all ages, the wage gap between the sexes increases with age. This wage gap is greatest between males and females age 45-64. Male workers are at the height of their earning power between age 45-54. By contrast, the median wage for full-time female workers in the 45-54 year-old age group is basically the same as that for full-time women workers age 25-34 and age 35-44.

In 1986, women aged 45-54 had median incomes that were 37 percent of men's in that age category; women aged 55-64 had incomes that were 35 percent of men's in the conmparable age category.

And the second reason that so few ADEA claims are filed by older women is that older working women experience aging under a double whammy-- the widely held misperceptions of working women as either not agressive enough or too agressive or too sensitive or working for "pin money," combined with the myths of older workers being too stuck in their ways, not quick enough, or too old fashioned.

Only recently have midlife and older women begun to recognize that beliefs long held as truism are nothing more than pernicious discrimination. How often as a society have we been told that men become more "distinguished" as they age, but women just become "grandmotherly."

B. Working Older Women Are Not Aware of their Employment Rights

The dearth of ADEA claims filed by midlife and older women is an indication of one of two situations, either older women are experiencing much less discrimination than older men do or they are unaware of or unable to pursue their rights under the law.

It has been OWL's experience that very few women are aware of their rights under the ADEA, or Title VII of the Civil Rights Act, or any other employment statutes for that matter. Staff in our national office field more questions about employment rights than any other issue. These questions may be related to the ADEA or employer mandated health insurance continuation under COBRA, for example.

To fill this vast information gap, OWL is mounting a public education campaign of the rights of women workers under federal employment statutes and state human rights laws.

On Monday, we released a new publication that is a handbook for attorneys and laypersons in pursuing joint age and sex discrimination claims. OWL is encouraging its members to know and use their rights protected by the ADEA. Far too often, older women buy into the myth that they are no longer useful employees. The whole purpose of the Older Women's League is to encourage these women to stand up for their rights.

C. Employers Are Using Unsupervised Waivers to Deny Employees Their ADEA Rights

Given that most women do not know their rights under the ADEA, it is easy to understand why unsupervised waivers of ADEA rights should be the exception to the rule and not the rule, as the EEOC has contended.

ADEA claims usually arise out of a termination, layoff, or forced early retirement. For an older worker, especially an older woman worker, this abrupt ending to a job means an uncertain economic future. These women may be divorced, single, or widowed head of households. As older women, their chances of obtaining a comparable job are much less than a man's, and their early retirement social security and pension benefits are most assuredly well below those for a man.

Faced with the unenviable "choice" of either being terminated, laid off, or given early retirement period, or being let go, but with a sum of money if you sign a waiver of your ADEA rights, what would any reasonable woman facing months of unemployment do? Can there be any doubt that employees do not "negotiate" the terms of their terminations.

And at the time the employee is signing away her rights, she is unaware who else is being terminated, and who who is going to replace the persons terminated. Therefore, the employee is unaware of whether a claim under the ADEA exists.

Under these circumstances, how can any waiver be "knowing and voluntary?"

II. The EEOC Has Inadequately Protected Workers' Rights

When employees began asserting in court that these unsupervised waivers were not binding, the EEOC established a rule as to when unsupervised waivers would be "knowing and voluntary." Unfortunately, instead of establishing guidelines to protect the rights of workers, the EEOC's rule served only to protect the interests of employers in shielding themselves from lawsuits.

The rule issued by the EEOC in August 1987 set very easy standards for employers to meet in using waivers without guaranteeing that employees really understood what their rights were.

The rule defined a "knowing and voluntary" waiver as occurring when:

"(i) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

"(ii) A reasonable period of time was provided for employee deliberation;

"(iii) The employee was encouraged to consult with an attorney."

Under this rule, employers would be free to violate the ADEA with almost complete impunity. Employees could pursue their rights only after first proving that the waiver was not knowing and voluntary. Thus, the EEOC succeeded in changing the intent of Congress under the ADEA that the burden of proof should be on the employer and that the fullest protection should go to the victim and not the perpetrator.

Fortunately, Congress interceded to suspend the implementation of the rule for both fiscal years 1988 and 1989.

III. S. 54 Would Protect Workers Without Discouraging Exit Bonuses and While Still Allowing Employers to Negotiate Waivers

A. S. 54 Protects Workers' Rights

What the EEOC was seeking to accomplish by its rule was to give employers guidance as to when a waiver could be accomplished without supervision by the EEOC or the courts.

The Older Women's League believes that S. 54 provides this guidance to employers without forfeiting the ADEA rights of employees.

S. 54 would allow unsupervised ADEA waivers only when obtained in settlement of a specific charge or claim of age discrimination. This language follows the intent of Congress in enacting the ADEA and would fairly balance the rights of the employees against the interests of the employers.

Congress intended for unsupervised waivers to be the exception and not the rule. In Section 7(b) of the ADEA, Congress explicitly stated that the ADEA will be enforced with the powers, remedies, and procedures of the Fair Labor Standards Act (FSLA). (See, Lorillard v. Pons, 434 U.S. 575 (1978), except for express changes, Congress intended to incorporate fully the remedies and procedures of the FSLA into the ADEA.)

For over forty years, the Supreme Court has held that under the FSLA unsupervised waivers are generally invalid, especially when not obtained in a negotiated settlement of a pending bona fide factual dispute. (See, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).)

Even the recent Circuit Court opinions that have upheld unsupervised waivers also have limited their holdings to waivers of bona fide factual disputes.

The EEOC rule went further than these court decisions by allowing blanket unsupervised waivers, similar to those allowed under Title VII. However, Title VII claims normally come up during hiring or promotion and not termination. An employer very seldom seeks a waiver of an employee's Title VII rights except in an adversarial circumstance after an employee has made a bona fide claim of her rights.

ADEA waivers are most frequently used in situations without a pending claim of discrimination. Most often employees are asked to waive their rights even before they could have any possible knowledge or evidence of age discrimination.

By only allowing unsupervised waivers after a bona fide claim of discrimination, S. 54 upholds the intent of Congress in enacting the ADEA and would place ADEA claimants on a par with Title VII claimants.

B. Under S. 54, Employers Would Still Offer Exit Bonuses

Employers are alleging that unless they are able to obtain waivers of ADEA claims when reducing their labor force, they will simply terminate employees without offering them incentives to leave.

This is yet another example of employers attempting to trample the rights of employees by alleging that they will do terrible things if employees laws protecting employees are enacted. It has not been so long ago that the Chamber of Commerce claimed that passing Title VII or the Equal Pay Act or the Pregnancy Discrimination Act would hurt women because employers would not hire them.

In fact, the Chamber is using its worn out threat currently with the Family and Medical Leave Act, claiming that employers will refuse to hire women of childbearing age if this bill is enacted.

Similarly, an increase in the minimum wage will only hurt workers by denying them jobs asserts the business community.

After systematically opposing every fair labor law on the books, including the Fair Labor Standards Act, the Chamber of Commerce has cried wolf far too many times to maintain any credibility within the halls of Congress.

This Labor Subcommittee found last year that the overwhelming majority of companies do not seek waivers at all in offering exit incentive programs. Since 1985, more than 13,000 workers were part of a voluntary reduction in force at IBM. 11,000 workers voluntarily left DuPont. 16,500 left AT&T. 6,000 at Phillips Petroleum. 3,500 at Union Carbide. 1,600 at Hewlett-Packard. 650 at Polaroid. 600 at Mellon Bank. And 600 at CBS.

None of these companies asked employees to waive their ADEA rights as a prerequisite to participating in the exit programs.

It makes sense for employers to offer exit incentives, because satisfied employees are not going to sue. A waiver offer could arouse needless suspicion if an employer is offering a nondiscriminatory exit plan.

An employer's best safeguard against ADEA suits, with or without S. 54, remains the offering of a nondiscriminatory exit plan--not a waiver.

C. S. 54 Still Would Allow Waivers in Cases of a Bona Fide Dispute

Where an employee has raised a bona fide claim of age discrimination, the employer and employee may, under S. 54, negotiate a settlement of this claim without supervision by the EEOC or the courts. In this situation, the employee has demonstrated an awareness of her rights and both the employer and the employee can negotiate a "knowing and voluntary" settlement.

Thus, S. 54 would still allow employers the certainty of a waiver in those cases where an employee has legitimately weighed the value of her rights and has received a fair value for the relinquishment of those rights.

Conclusion

In conclusion, the Older Women's League believes that the Waiver Protection Act strikes a fair balance between protecting workers' rights and yet allowing unsupervised waivers in those limited cases where a bona fide claim has been asserted.

We look forward to working with the Chairman to see this legislation swiftly enacted into law.

Senator METZENBAUM. Thank you, Ms. Jones. Mr. Dichter, we are happy to hear from you, sir.

Mr. DICHTER. Mr. Chairman and Senator Jeffords, I appreciate the opportunity to testify here this morning. I am a partner in the law firm of Morgan, Lewis and Bockius in our Philadelphia office. I am also the management co-chair of the Committee on Equal Employment Opportunity Law of the American Bar Association's Section on Labor and Employment. However, the views I am expressing here today are my own views, not those of the ABA or our law firm.

The use of releases under the ADEA arises in two basic kinds of situations. One we heard about today and probably heard most about is the voluntary, at least allegedly voluntary reduction in force program where there is an incentive for someone to leave the work force. We also will hear about it in the involuntary situation. I sympathize, as I assume we all do, with the plights of Lancaster and Patterson and Clay, at least based on their side of the facts. We of course have heard only their side.

But S. 54 would not help what are their basic complaints. Their basic complaints in all three cases were the fact that they were being terminated from their employment. That is what they were complaining about. The issue here though is whether they will receive enhanced benefits as part of that termination or not. The incentive for the employer to give those enhanced benefits is to avoid litigation over the termination.

The clearest example of that was Mr. Lancaster's case. He, in fact, was first offered six month's compensation. Then he was told he would be given 12 month's compensation, if he would agree not to sue the employer. It was obvious in that case the incentive to offer the increased benefits was for the employer to avoid litigation.

He did, nonetheless, challenge that release in Federal court, both in District Court and the Court of Appeals and four Federal judges found that to be knowing and voluntary. The choice he was faced with was not to continue working or not, the choice he was faced with was whether he would accept a year's additional pay and six month's additional insurance, in exchange for agreeing not to sue the company or forego that and take his chances with the lawsuit. That is what the issue is about. That is what S. 54 deals with.

The concerns raised by Mr. Lancaster and others, I think, can be satisfied with some modification to the EEOC's rule or perhaps in legislation. Informing employees their rights under the ADEA. I certainly agree with that and I think most responsible employers do. Barring waivers does not do that. In fact, as my Senator Heinz said or suggested this morning, that the use of waivers might make employees suspicious. I am not so sure that is bad. Making employees suspicious will mean they will be more likely to contact an attorney and ascertain whether they are better off turning down the enhanced benefit and taking their chances with a lawsuit, or accepting a year's pay and 6-month's of insurance, and foregoing their rights under a lawsuit. I do not think making employees suspicious is necessarily something that any of us ought to be concerned about.

In fact, the other points are consulting an attorney. I certainly have no objection, and I do not think a responsible employers do with a requirement that a release spell out in writing that an employee should be encouraged to contact an attorney or the EEOC. The time period—there again I think that is a matter which can be dealt with either in regulation or by statute—that there be a specified minimum period of time for someone to consider these matters.

Those are the basic kinds of complaints that we have heard about. In fact, the National Senior Citizens Law Center when they testified before this Committee last March, about a year ago, suggested that the EEOC supervision required by the law, as the alternative to the waiver could consist of a statement in plain English informing the employees of their rights and advising them to consult an attorney. I would suggest that that objective could be much better accomplished by requiring that to be in the release itself, rather than requiring the employee—well not requiring, but giving them the option to go to the EEOC.

In fact, as Mr. Galland pointed out, the present system appears to be working basically well. That is, the case courts are willing to examine these on a case by case basis, to determine whether they have been knowing and voluntary, just as they have done for almost 25 years under Title VII with race and sex cases. And I also agree with Mr. Galland that having spelled out criteria for what would constitute knowing and voluntary would be helpful. The EEOC attempted to do that in their regulations and certainly I and most of the responsible employers I know would have no objection to that being either by stature or by regulation and being as specific as possible. Because I think that is helpful to both sides.

So I think the basic concept and concern for a protection of older workers is one we all share, but the plights that we have heard about today would be harmed not helped by this bill. The very enticement for employers to offer enhanced benefits is to avoid litigation. If they cannot have that objective the enticement simply is not there.

[The prepared statement of Mr. Dichter follows:]

TESTIMONY OF
MARK S. DICHTER, ESQ.
MORGAN, LEWIS & BOCKIUS
PHILADELPHIA, PA
BEFORE THE SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
U. S. SENATE
MARCH 16, 1989

Mr. Chairman and members of the Committee I am Mark S. Dichter, a partner in the law firm of Morgan, Lewis & Bockius. I am the Management Co-Chair of the Committee on Equal Employment Opportunity Law of the American Bar Association's Section on Labor and Employment Law. I have also been the editor-in-chief of the supplements to Employment Discrimination Law published by the American Bar Association and the Bureau of National Affairs, the leading treatise in the field of employment discrimination law.

I greatly appreciate this opportunity to appear before you and testify on S.54, the Age Discrimination in Employment Waiver Protection Act. The views I will express here today are my own and not necessarily those of the American Bar Association, Morgan, Lewis & Bockius, or any other entity. These views are based primarily on my almost twenty years experience representing employers in the labor and employment law field and my involvement with the ABA EEO Committee.

The ABA EEO Committee is the principal organization representing practicing lawyers in the equal employment field. Our members consist of attorneys who regularly represent employees, claimants, labor organizations, employers and organizations such as the AARP and the NAACP Legal Defense Fund, Inc. The ABA EEO Committee has two co-chairs in addition to myself, one who regularly represents labor organizations and one who regularly represents individual employees, claimants, plaintiffs, and public interest organizations.

The ABA EEO Committee has the principal liaison function on behalf of the ABA Labor and Employment Law Section with the Equal Employment Opportunity Commission and the U. S. Department of Labor with respect to equal employment matters. As a regular part of our meetings and liaison activities with the EEOC we have had extensive discussions concerning the EEOC's Legislative Regulation and Administrative Exemption Allowing For Non-EEOC Supervised Releases Under the ADEA. As a result of my involvement in these discussions, I am quite familiar with the factors and policy considerations behind the adoption of that Regulation. In my testimony I will focus on the legal and practical rationale for the EEOC Regulation on ADEA Releases and respond to the concerns which have been raised with respect to the EEOC ADEA Release Regulation.

The principal impetus for many of us urging the EEOC to consider the adoption of a regulation dealing with releases under the ADEA was the initial circuit court decision in Runyon v. National Cash Register Corp., 759 F.2d 1253 (6th Cir. 1985). Prior to that decision, releases of claims under the ADEA, as well as under Title VII and state statutory and common law, were regularly obtained from employees where they were given additional benefits in connection with their termination. The Runyon decision was the first reported decision in which there had been a challenge to the validity of a release under the ADEA on the basis that it was not supervised by the EEOC or a court. Practicing attorneys representing both employers and employees, who negotiated, or advised clients, with respect to such releases, assumed that the same standards for judging the validity of such releases which had been applied for years under Title VII would also apply under the ADEA. Because of the uncertainty with respect to the validity of such releases under the ADEA created by the initial Runyon decision, the EEOC was urged to adopt a regulation which would clarify the law and set standards for determining the validity of releases under the ADEA.

Permitting Releases Under the ADEA as a Condition to Receiving Additional Compensation Is Consistent With the Objectives of the ADEA

S.54 deals with two different situations -- voluntary terminations pursuant to an incentive program and involuntary terminations where an employee is offered additional consideration in exchange for a release. While much of the discussion concerning releases and waivers under the ADEA has focused on voluntary incentive programs, particularly early retirement incentive programs, most of the actual litigation, including most cases involving releases and waivers, involves individual termination cases. The typical situation in which a release arises in such a context is where an employer selects an employee for termination and offers the employee additional consideration, frequently in the form of periodic or lump sum severance payments and continued health and welfare benefits in exchange for an agreement by the employee that he or she will not sue the employer with respect to the employment termination decision under any theory, including the ADEA, Title VII or state law. The choice the employee is given under those circumstances is quite simple and easily understandable -- the employee can agree to accept the offer of additional benefits and forego any suit or claim against the employer or the employee can reject the offered benefits and agreement and take his or her chances in pursuing a claim challenging the employment decision and/or seeking additional benefits through administrative or court litigation.

Most responsible employers' counsel have recommended to their clients that they obtain a release from an employee where that employee is being offered additional consideration in connection with that employee's termination, just as they would in any situation where there is to be an exchange of consideration for a termination of an ongoing relationship. The employer's concern in these circumstances is for finality in the termination of the relationship and to avoid the substantial costs, burdens and risks of litigation, not only under the ADEA but also under Title VII and state statutory and common laws. Responsible employers do not discourage the employee from seeking the advice of counsel in connection with such agreements and, in fact, in many cases, encourage the involvement of counsel. Furthermore, responsible employers provide employees with a reasonable time to consider whether or not to enter into such an agreement.

In connection with incentive programs designed to encourage employees to voluntarily leave the work force, such as early retirement incentive or severance incentive programs, an employer has a significant concern that an employee who accepts the offered benefits does so voluntarily. An employer implementing such a program today also has a concern that the employee agree that in accepting such benefits, the employee will not later claim that his or her decision was coerced or that his or her termination, or the program itself, violates the law, including the ADEA or any other applicable employment law. It is the objective of employers to avoid the situation where an employee takes the enhanced benefits and then later challenges his or her termination and/or the program.

The EEOC's Regulation on ADEA Releases Is Not Contrary to the Provisions of the ADEA

The objections to the EEOC's regulation on ADEA releases fall into two general categories -- a claim that the regulation is contrary to the provisions of the FLSA incorporated into the ADEA, and that the regulation does not provide adequate protection for older workers. The legal argument that the ADEA prohibits unsupervised releases has been considered by at least five circuit courts of appeal, all of whom have found that the provisions of the FLSA incorporated into the ADEA do not require EEOC or court supervision of releases or waivers.[1]

A comparison of the FLSA provisions dealing with minimum wage and overtime and the prohibitions against an employee waiving the statutory requirements of minimum wage and overtime payments has little applicability to the release of claims under the ADEA. The latter are clearly more analogous to discrimination claims under Title VII then they are to the minimum wage provisions of the FLSA.

Those supporting S.54 have suggested that the EEOC's regulation unfairly shifts the burden of proof from the employer to the employee with respect to the voluntariness of a termination or the agreement to accept additional benefits in exchange for a release under the ADEA. However, it is respectfully submitted that if the waiver and release is truly knowing and voluntary, under appropriate standards defined by regulation or legislation, then it is completely appropriate for an employee to have to demonstrate to the EEOC or a court why the written agreement which he or she knowingly and voluntarily signed in exchange for additional consideration should not be enforced. Concerns about an employee's lack of knowledge of their rights under the ADEA, the opportunity to consult with counsel, and an adequate time to consider whether to enter into the release, can adequately be addressed by modifications to the EEOC's regulation or through legislation.

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[1] Coventry v. United States Steel Corp., 856 F.2d 514, 47 FEP Cases 1560 (3d Cir. 1988) (citing with approval the EEOC Regulation); Cirillo v. ARCO Chemical Co., 862 F.2d 448, 48 FEP Cases 678 (3d Cir. 1988); Dorosiewicz v. Kayser-Roth Hosiery, Inc., 823 F.2d 546 (4th Cir. 1987); EEOC v. Cosmair, Inc., 821 F.2d 1085, 44 FEP Cases 569 (5th Cir. 1987); Runyon v. National Cash Register Corp., 787 F.2d 1039, 40 FEP Cases 807 (6th Cir.) cert. denied, 479 U.S. 850 (1986); Lancaster v. Buerkle Buick Honda, 809 F.2d 539, 42 FEP Cases 1472 (8th Cir.) cert. denied, 107 S. Ct. 3212 (1987).

The Principal Concerns Expressed by the Opponents to the EEOC ADEA Release Regulation Can Be Satisfied By Simple Amendments to the EEOC's Regulation

The National Senior Citizens Law Center, in its testimony before this Subcommittee on March 17, 1988, raised three basic arguments in support of its assertion that waivers and releases under the ADEA arise in inherently coercive circumstances: (1) that proof of age discrimination is a complicated matter with the remedies unclear at the time of termination; (2) that a voluntary choice requires a reasonable time to consider the release and this is frequently not provided, and (3) that additional benefits are made contingent on the release.

It is the very factor of the complicated proof issues of liability and damages in an age case which demonstrate the difference between the ADEA and the FLSA and justify the offering of additional consideration in exchange for a release of claims under the ADEA.

The concern about adequate time for an employee to consider a release can be easily satisfied by specifying a minimum time period. Because the decision to accept the additional compensation in exchange for the release is usually independent of the termination decision, there is no reason why an adequate time period to consider the release cannot be provided. The choice an employee must make -- the choice between additional compensation with a required release and foregoing the additional compensation in favor of litigating his or her rights through the administrative or judicial process -- is clearly not an unusual or unreasonable choice.

I do not believe that most responsible employers would object to including specified language in their releases which would inform employees of their rights under the ADEA and encourage employees to consult with either the EEOC or a private attorney prior to entering into the release. Concerns about adequacy of time for employees to make decisions concerning the release could be easily remedied by a specified minimum period such as 15 or 20 days. Federal courts have had almost 25 years of experience under Title VII, with no apparent difficulty, in evaluating the validity of releases under a knowing and voluntary standard.[2]

The Concern for EEOC Supervision Can Be More Effectively Satisfied by Required Release Language

There has been little discussion of what would be required for the EEOC to "supervise" an ADEA release. The National Senior Citizens Law Center, in its March 17, 1988 testimony before this Subcommittee, suggested that the supervision obligation could be satisfied by a system "which responds to a waiver approval request with a statement to the employee, in plain English, setting forth the employee's rights and remedies under the Act and advising the employee to consult with an attorney before agreeing to the settlement." If this is what would be required for EEOC "supervision" then this can be much more efficiently and effectively accomplished by requiring this advice to be contained in writing in the release itself.

Conclusion

To suggest that an employee who is prepared to accept additional consideration (frequently in quite substantial amounts) in exchange for an agreement not to sue his or her employer concerning his or her termination cannot enter into an agreement which would be effective under the ADEA, without the EEOC supervising that agreement, is unreasonable, unworkable and inconsistent with the ADEA and the national employment policy to encourage voluntary resolutions of potential disputes.

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[2] See e.g., Ott v. Midland-Ross Corporation, 523 F.2d 1367 (6th Cir. 1975) (Court considered whether waiver of ADEA rights was fraudulently induced).

Again, I thank you for this opportunity to speak on this important matter and would be pleased to provide any additional information or answer any questions you might have. I respectfully request that my written remarks be made part of the record.

Senator **Metzenbaum**. Thank you very much, Mr. Dichter. Ms. Shattuck, we can hear from you?

Ms. **Shattuck**. Thank you, Senator.

Senator **Metzenbaum**. Was there not a John Shattuck?

Ms. **Shattuck**. Yes, at the ACLU, and now he is at Harvard.

Senator **Metzenbaum**. Is that your relation?

Ms. **Shattuck**. Distant, yes, and I know him well. We agree on many things and disagree on many things, as you might well guess.

I appreciate the opportunity to be here and talk with you, Mr. Chairman and Senator Jeffords. I have felt for a long time that there has got to be a middle ground to the debate that we have been talking about here this morning, and you have been considering now for two years. I think that we really need to take a look at what is the matter of public policy is in the best interest of all of our citizens and especially the aging population.

And along those lines I come from the West and was raised in a family where no one ever retired, including the women, and so the idea of having someone say to even one of our employees—we never had a mandatory retirement for employees who worked for us—that you have to retire at age 60 or that you have to retire, or you are just out of luck. We never would have done anything like that.

And now we are faced with the situation where we have rights that did not exist in those days as I was growing up, and I think that my belief is that the American people and especially older workers, if they are given information, can make a knowing decision. And I think that has been one of the gaps in terms of enforcement, if you will, of the Age Act over the years. It has been in existence for a long time, and we have heard here today that a lot of people did not know what their rights were.

It seems to me that there is a way to make the rights be known to the individuals who may have rights that they can exercise. That is a very bad sentence, but I think you understand what I am saying. And I think that the way to do that is if you have, for example, a plant closing, the jobs are being lost. So the job issue is no longer one that is there. The question is what happened before they lost their jobs? What kind of rights might they have accrued? They might have rights to pensions, if those are mandatory under law, they would automatically get those. But there might have been something else. There might have been another event. They might have been demoted or denied a promotion or maybe even, God forbid, age came into a decision at some point.

And the employer is saying we are getting rid of this work force. We are closing the plant. In return for some extra benefits, we want to make sure that when the plants close, the plant close. We do not want to stay here for 15 years and litigate a case on someone that was terminated when the plants closed. And we want a release. We will give added benefits. We will supplement pensions. We will give money. But it really is because the jobs are gone. That is one case.

The second case is this voluntary situation. And there are a lot of good employers out there that I would like to encourage you to think about today. They do not all go out with the idea that they are going to discriminate, nor do they go out with the idea that they will have coercive voluntary selection procedure.

A lot of the employers that I have worked with have been very, very careful to make sure that they do not select on the basis of age, or that they do not encourage people to take the program because they are older. They do extensive training for their supervisors, the people who are announcing the program, and they do not even make up a list of who might go, as unfortunately we heard about today. They do not do that list ahead of time.

They send out the voluntary program. It is available to everyone. If they opt in, fine. If they do not, and they do not get enough people to reduce the size of their work force, then they will go through their regular exercise of determining who they will have to terminate, whether it means closing departments or doing a review of performance appraisals and determining on that basis. But then they will make the decision, if they do not get enough volunteers.

My experience has been that they get enough volunteers. In fact, if the package is generous enough, they get too many and then they end up hiring the people, and generally they are the older people who are rehired because they have all the experience on a contract basis. So there is a lot going on here. But it seems to me that what we could do is instead of simply saying, you have got to take a D, E or C, you have to have somebody file a complaint. Why do we not educate the individuals and set some minimum standards whether by regulation or legislation.

And those minimum standards, I think, as we have talked about today, but I would like to suggest that they also include the address and telephone of the nearest EEOC office, with the description of what the provisions of the Age Act are, that the individuals are encouraged to go to EEOC to find out more about their rights. That they can file a complaint. That they have a private right of action. I think it all ought to be set right out there. Here is where you can get help from your Government, if you want to know more about it.

And that is what I am hoping that you will consider as you look at this legislation and I would be happy to answer any questions you might have.

[The prepared statement of Ms. Shattuck follows:]

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TESTIMONY OF CATHIE A. SHATTUCK

Before the Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate

Hearing on Age Discrimination
in Employment Protection Act of 1989, S.54

Thursday, March 16, 1989
Washington, D.C.

Mr. Chairman and Members of the Committee:

I am Cathie A. Shattuck, a partner in the national law firm of Epstein Becker & Green and a former Commissioner and Vice Chairman of the Equal Employment Opportunity Commission. I thank you for the opportunity to discuss my concerns about S.54, the Age Discrimination in Employment Waiver Protection Act of 1989.

The opinions I express today are my own and are based on my nearly eighteen years as an attorney practicing in the employment law arena. During that time I have been privileged to represent the Colorado State Civil Rights Commission, the Equal Employment Opportunity Commission (both as a trial attorney for four years and as a Commissioner for two years), individuals seeking their rights as complainants and plaintiffs, employers seeking to comply with various employment related laws including Title VII and the ADEA and in defending employers in administrative proceedings and in court. My interest in the question of age discrimination began in 1978 when I represented a college professor who was being forced to retire at age 65, a policy that although legal, did not make much sense to me. Thankfully, Congress has now abolished the retirement cap for most jobs so that individuals may now work as long as they choose and as long as they can perform their jobs.

In the late 1970's and early 1980's the Age Discrimination in Employment Act (ADEA) began a viable tool for protecting the employment rights of older workers. Court decisions and jury awards made it clear that employers could not use age as a factor in deciding who would be fired. During my time on the EEOC ADEA, complaints increased each year at the rate of 100% and now such complaints comprise 50% of EEOC's charge inventory. Studies conducted by my office of cases tried from 1981-1983 indicated that the typical plaintiff in such cases was a white male, 55 years of age, making over $30,000.00 per year. The majority of the cases filed with EEOC and tried in court have involved terminations of employment and the relief awarded was and still is far greater than the relief obtained under other civil rights statutes. In the early 1980's plaintiffs began filing lawsuits in state courts alleging wrongful discharge in employment under both contract and tort theories. Many of these lawsuits included alleged violations of state and federal civil rights acts, including the ADEA. The relief awarded in such cases is substantial, ranging from several thousand dollars to several million dollars.

It should come as no surprise that such awards got the full attention of employers and those who advise them. The potential liability to an employer when faced with an ADEA lawsuit and the changed and changing economic conditions both in the U.S. and elsewhere has made it mandatory that employee terminations not violate common law or statute (including the ADEA).

As a matter of survival many companies were and are still forced to reduce their workforces either through restructuring, plant closing, lay-offs, elimination of positions etc. The bottom-line is that the number of jobs is declining at some companies and the question for employers is how to effect such a reduction without losing the confidence and loyalty of its remaining employees, its terminated employees, its investors, and the community at large.

The other bottom-line goal of employers is to manage their resources in such a way that their compliance with the ADEA and other laws will result in the availability of money which could be used to the benefit of the terminated employee, either as increased severance pay or extended benefits. In many companies the numbers of people to be terminated were so great and the job loss so permanent that the companies wanted to make sure that their former employees would have an income while they looked for other jobs (many companies provided extensive job search and outplacement services) or while employees waited for their pension plans to start paying retirement.

Most employers used one of two basic approaches in reducing its workforce, employer selection or employee self-selection. When employer selection was used by a company there were a variety of procedures followed and in cases where the entire workforce was not being terminated many successful programs based their decisions on supervisor and co-worker performance appraisals, needed skills under the new structure. An internal special employee grievance procedure whereby an employee could challenge his or her selection for termination on the basis of age or other bias and on the basis of any other factor being wrongly applied or considered was and is commonly used. It is important to note that most employers also instituted a legal and human resources review of all terminations to make sure that age discrimination was not a factor in the decision before the employee was notified of his or her selection for termination.

When the employee was notified of his or her selection the employer advised the employee about COBRA, severance pay, pension rights and other legal or ERISA entitlements. The employer also advised the employee that the company would add to or increase severance, pension or other benefits in certain circumstances. Such increased benefits were usually based on a formula involving the length of service with the company and the salary of the employee, and was limited to a certain dollar amount or a number of weeks added pay. Payment might be available on a weekly basis or in a lump sum and might also include extended benefits. When notified of these available extra benefits the employee was typically told that he or she must sign a release waiving any rights or she might have against the company up to the date the release was signed.

In the terminations involving employee self-selection the employers told their employees that they were eligible to participate in an enhanced termination program which entitled them to additional money, and/or years of service added to a pension or other benefits. All employees in a job group, section, division, plant or even the entire company were informed of the program and were told that they could voluntarily self-select participation and that they would be required to sign a release and waiver of rights in order to receive the enhanced money or benefits upon termination.

With this background in mind, I have carefully examined this proposed legislation (S.54) and the statements of the distinguished sponsors which accompanied its introduction. I will be the first to admit that not all companies have acted properly in terminating employees or in securing releases. It is the good companies and employers that I am concerned about here today; those who have instituted internal programs to ensure that they do not discriminate on the basis of age and who have made every effort to inform and advise their employees so that they can make a knowing and voluntary waiver of rights.

In the context of employee knowledge of his or her ADEA rights, the employers who have specifically stated that ADEA rights will be lost with the signing of a release, advised the employee to consult with an attorney, and given the employee time to seek advice and make a decision, have succeeded where such releases were challenged in court. But, success in court is not the real issue here. The real issue is how to better inform employees of their rights and to preserve the very real economic cushion many employers are willing to provide, over and beyond what is required by law or everyday practice, so that employees without jobs can live with dignity while seeking new employment or waiting for a pension to begin paying out.

One of many alternatives to S.54, which would meet the concerns of the bill's sponsors, would be to require employers to inform and educate their employees as to their ADEA rights as a condition precedent to the signing of a release. One way to educate such employees might be to present them with the following information, either in a prescribed notice or in a letter, when enhanced termination benefits are offered and a release is sought:

1. A statement as to the coverage of the ADEA and the type of discrimination which it prohibits;
2. The value and amount of the enhanced benefits offered;
3. A minimum amount of time in which they can consider the offer, i.e., 15, 20 or 30 days;
4. Information as to the telephone number and address of the nearest EEOC office and advice to the effect that the employee should contact EEOC for further information as to his or her rights under ADEA;
5. Advice that the employee may wish to consult an attorney with respect to ADEA rights;
6. Notice to the effect that signing the release may result in the employee's loss of rights to recover damages or obtain reinstatement; and
7. Advice to the effect that the employee is not restricted by the release in cooperating with EEOC's as it exercises its authority and responsibility to investigate and prosecute ADEA violations.

It is my experience that the more informed individuals are of their rights and where they can get help from their government, the more they ask questions and are better able to make informed decisions. This is true whether they are contracting for the purchase of an automobile or signing a release. In both instances a contract is being formed. Basic elements of a contract must be present in order for it to be valid and it is the same with respect to releases.

The contract elements as applied to releases are:

1. The release must be voluntary and without coercion;
2. The release must be knowing, i.e., each party must know what it is giving and what it will receive in return;
3. There must be consideration, i.e., each party must get something of value from the transaction such as enhanced benefits in return for a possible exercise of a right to sue - the value may be a possible right and is not limited to an actual right as long as it is of value to the recipient;
4. There must be a reasonable time for the offer to be accepted and because of the nature of the consideration it is advisable that the release be in writing.

Releases containing such elements are part of day-to-day business in the United States and in the employment context they are used to settle disputes between employees and employers as a matter of course.

In addition, releases are used to buy-out possible employee disputes and to settle real or potential disputes on a one-on-one basis. The real effect of S.54 in individual cases would be to create a system whereby disputes could not be settled without the intervention of EEOC or a court and would put an end to many internal company grievance programs that have been developed over the years to deal with employee complaints. The requirement of EEOC or court supervision would also escalate the grievance procedure from one in which the parties seek to solve a problem to one in which the employer finds itself in an adversarial situation where it must defend its actions and suffer either an expensive and time consuming EEOC investigation or the delay and expense of a lawsuit. As a matter of public policy, I believe that the better course in such circumstances would be to encourage private settlements.

I appreciate the opportunity to testify before this subcommittee and would be pleased to provide further information or assistance as it examines the question of releases under the Age Discrimination in Employment Act.

Senator METZENBAUM. I just have a couple questions, then I am going to turn the hearing over to Senator Jeffords, as I am going to have to leave. Ms. Shattuck and Mr. Dichter, as you know, employers for many years have offered exit incentives in an effort to reduce their work forces quickly, humanely and with a minimum of litigation.

Do you really believe if this bill is enacted companies will stop using incentives when faced with the need to make substantial work force reductions? What else will they do, will they fire people? I think you are saying, Ms. Shattuck, that they will get as many voluntary and then they will just terminate those in excess if they want to bring their work force down.

Now the point is that the GAO says that 75 percent of the incentive programs covering 90 percent of the participating workers involved no waivers. And I think we have to keep our eye on the fact that the bill has to do with waivers, not with the question of whether or not employers should or should not bring about reductions in force.

Ms. SHATTUCK. I had an opportunity to look at the synopsis of the potential report, and first of all the waiver number, I think, is probably incorrect because it does not take into consideration the ERISA plans which may be amended and supplemented, but do not require or do not even allow a waiver in those circumstances.

Also, you are only studying the mass kind of situation. Some companies at one time used waivers, maybe did not for another program, depending on what they were doing. The third thing is that this does not take into consideration the company use of waivers in individual's termination situations, whether they be upper management or lower management. And that is a very common practice, even with the companies that I know who do not use them when they do a program. They use them on a daily basis.

Mr. DICHTER. Mr. Chairman, to respond briefly to your question. I think one of the other facts that was pointed out this morning in the GAO testimony is that there has been a significant increase in the use of waivers among this limited sample. And that is the result of the increased amount of litigation. People challenging these programs.

The purpose of the waiver is for the employer to reach an agreement with the employee that this termination is, in fact, voluntary and the employee is faced with a choice. The choice is not termination or no termination. The choice is enhanced benefits in exchange for giving up their right to sue. If we make sure that is a knowing and voluntary decision, then I think that is a decision that employees should have the opportunity.

If employers do not have that, Mr. Lancaster's case is a perfect example, if the company could not get him to sign the agreement, he would not have gotten the extra year's pay. That was made clear to him. That was a choice he had to make. What you are saying is if you ban the waivers, he will not get the extra year's pay. He can bring his lawsuit and he may wait years, and he may or may not recover. But he will not get that extra year's pay in the meantime.

So all of the plight that he described today would be aggravated even further because he would be without that year's pay.

Senator **Metzenbaum**. We would have a waiver under certain prescribed circumstances, but we want to be certain that the employee is protected. Let us face it, when the employer is dealing with the individual employee and he is saying either take it or you are through, the employee gets the shakes. He suddenly is frightened.

What we are trying to do is provide some cover so that the employer does not give him that squeeze. I was an employer, I had lots of employees. But the fact is there is a realization the employer has the upper hand. We are trying to put them on an equal playing field.

Mr. **Dichter**. I agree with that, but I would rephrase what you said only slightly. What the employer has said in Mr. Lancaster's case is that you are through. First of all, in any event, whether you sign this or not, whether you take the year or not.

Now the next thing they say to him is you have two choices, your employment is going to be terminated. One choice is we will give you a year's pay if you agree not to sue us. The other choice is do not take our year's pay, and sue us and take your chances in court.

Now I agree that he should have more information. I have no problem with telling him that he should go consult an attorney, and giving him adequate time to do that. And with Ms. Shattuck's suggestion, we tell him where the EEOC is, tell him about the Age Act, tell him about his rights under that, but give him that and let him make an informed decision.

I do not think requiring him to have a written charge of age discrimination as a requirement for getting that year's pay is a fair requirement. That is the one part that I find trouble with is requiring him to claim that there is age discrimination. He may or may not know that. He may be very happy with the year's pay.

Senator **Metzenbaum**. One last question that I will ask and then I will turn it over to Senator Jeffords. Mr. Galland, our bill defines a bona fide claim as either a lawsuit, a charge or a written allegation. As a lawyer practicing in this area, do you believe that the approach is flexible enough to allow for settlements between parties that want to enter into such agreements?

Mr. **Galland**. Sure, I have no question that it is. I think picking up on the point that was just made. All three of these people who testified before us could have made an absolutely binding agreement, waiving their rights under the ADEA, if S. 54 passes.

The only thing that they would have had to do to make such an agreement was to state in some written form at some point, that they had a claim of age discrimination that they were giving up. That is all they had to do. They did not have to file charge with the EEOC and they did not have to file a lawsuit. All they had to do was say it in a letter.

If they did not say it, then they are not going to release their claim. But if Mr. Lancaster, after consulting an attorney, simply said I understand that I have a claim with age discrimination against this company and I hereby waive it, that would have passed muster under this bill. So I do not see this bill inhibiting that kind of agreement at all.

I also do not think frankly that even if a bill absolutely forbade this kind of thing, and this one does not, that that would have too much of an effect on severance arrangements. Employers have been offering severance arrangements for many years to many employees without asking for releases. And it is very common to give severance pay to employees who are fired without demanding those releases. I do not really think that this bill will inhibit the giving of severance arrangements any more than it would inhibit the offering of voluntary early retirement plans.

Senator METZENBAUM. Thank you, Mr. Galland. Senator Jeffords would you be good enough to bring the hearing to a conclusion after you ask your own questions?

Senator JEFFORDS [presiding]. Certainly, Mr. Chairman. I would be more than happy to do so. I have a number of questions. I have not been involved in this area as long as Senator Metzenbaum has. And I would like to help you educate me a little bit, if you do not mind. I have a problem with trying to differentiate the difference of treatment, if any, there should be between individual claims and sort of the general program type situations.

I am concerned as to whether or not there are differences there to be considered in this legislation, but more importantly, I am concerned as to what will happen if the EEOC with its present staffing is required to give pre-approval to both individual and programs, and what the implications would be with respect to businesses, if they knew that this was going to require a year or a year and a half's delay on programs generally or the use of waivers? So maybe if you could just—Mr. Galland, why do you not start?

Mr. GALLAND. Senator, as I heard Chairman Thomas testify, it occurred to me you have to divide the EEOC's problem into two groups. To the extent that the claim of discrimination arises afterwards, there is no problem different than the present problem.

A charge exists and the EEOC tries to conciliate it. They are supervising under my definition. The only problem that could possibly arise with the EEOC is if Congress wants to give EEOC the task of giving pre-clearance, a sort of pre-approval to an employer's program, and the effect of that pre-approval under here would be that waivers would not have to go through this gauntlet in order to be upheld. They only have to be presumably knowing and voluntary.

I guess I have two reactions to that notion. Number one, is if the EEOC cannot handle a request for pre-clearance fast, then an employer has a choice. They can wait or they can go ahead and take their chances. But number two, I do not think anybody who has dealt from either side with the EEOC ought to be all that happy about Congress giving the EEOC a sort of advisory advance opinion about a program that the employer wants to take.

The employer can put on a dog and pony show for an overburdened EEOC investigator and make the upcoming program look like the cleanest and most voluntary and wonderful thing in the world, and then when the actual waivers are elicited, that is when the employees are called in and say, you better take this because we do not know where you are going to end up.

So I do not think frankly that the idea of getting pre-clearance through the EEOC is a very good idea. I do not think that the EEOC presently does a very good job in almost anything that it does to be truthful to you. And I do not think that employers think so either. I think that anybody that represents an employee as I do or an employer as I do, thinks that the EEOC's investigative staff is overburdened and does not do a very good job even with the claim that is already in existence. There have been too many cases I have had where an employer I represent has gotten socked by an EEOC finding, and vice versa when I represent plaintiffs.

So if you want to solve that problem, I think the way to do it is to ease Chairman Thomas' mind and take that task away from him.

Senator JEFFORDS. Mr. Dichter?

Ms. JONES. Could I interject for a minute, Senator?

Senator JEFFORDS. Certainly.

Ms. JONES. I think it is important what Mr. Galland has been saying here. When we gave our advisory opinions at the FTC, all we could do was give it as far as the plan looked, not in application. You could never give any kind of clearance for any kind of—in our case it was usually marketing distribution plans. We could never give it in terms of how it was applied in a given instance. And nor could we ever or did ever try and prevent individual companies, say for example, from filing treble damage suits, from depriving them of their rights under that.

All we did was give exactly what it was called, an advisory opinion, that given the facts you have given us, the way this looks to us, and we might even hedge it a little bit, but it had nothing to do with how it was applied. It could not. We have no way of knowing how it is going to be applied.

So all of the things that the witnesses have been saying here, the kind of tone of voice that is told to an employee and that kind of conference, and while I am talking for a minute, let me just talk about the suggestion that we can solve this problem by giving employees information, that is, it simply does not do it. You cannot have in that kind of a traumatic situation the employer disclosing to the employee all their so-called rights. The rights that they are disclosing is to go to a lawyer. Most employees do not know lawyers, cannot afford to go to them, do not know how to find them.

Senator JEFFORDS. Are you saying that there should be no waivers allowed?

Ms. JONES. I think the way this bill is formed, it will work fine. I do not mind the fact that a waiver should be there, obviously for a settlement of a claim. No problem with that. But to give kind of pre-clearance systems to general——

Senator JEFFORDS. You would allow waivers only on settlement of claims?

Ms. JONES. That is all. Which I understand really is what this bill is doing.

Senator JEFFORDS. Mr. Dichter?

Mr. DICHTER. Yes, Senator Jeffords, you began by first asking about the difference between these circumstances. And I think they are very different and may require some difference in treatment, and we can see just from the examples today. Mr. Lancaster's case was an involuntary termination. There is not any question about that. It was not a voluntary program. The company initiated that and told him he was going to lose his job. The choice he was given was, if you want to challenge that decision, you are free to do so, and you get whatever vested rights you have in this company, vacation pay, severance or whatever.

However, we would like to avoid that. We would like to avoid the lawsuit under any theory. Whether it be wrongful discharge, age, national origin or whatever. And we are willing to pay a substantial amount of money to do that. We are willing to give you a year's pay which we are not legally obligated to give you. And give you six month's health insurance benefits, which we are not legally obligated to give you, to know that the employment relationship will be terminated, and we will not be faced a year from now or two years from now or 10 years from now with a lawsuit over that. That is really the choice.

Now I do not disagree. He may not have been given adequate time and and opportunity to receive counsel in making that choice, although the Federal courts which examined that found that it was knowing and voluntary. That is a question that could be changed if the standards were changed. That is one set of cases and I think this law would preclude that because in each one of these examples, the individual said, I did not know that I had an age claim at the time.

This law requires that they state one in writing. They could not meet that requirement in good faith because they did not know or think they had an age claim. So they could not waive their rights and accept the enhanced benefits.

So Mr. Lancaster's case, if the requirement was, that the only way he would get the extra year's pay and have an effective waiver, was to assert a written claim of age discrimination that would not be bona fide because he admitted here he did not know he had an age claim at the time. That is one set of circumstances.

The other set of circumstances is the incentive programs, the voluntary incentive programs. There are two kinds of potential challenges to those programs. There may be three kinds. One is the question of voluntariness. Was it a truly voluntary program or not a voluntary program? That again, the law is presently prepared to deal with. If it is not a voluntary choice, then it is involuntary, and we know the basic standard is a knowing and voluntary waiver of rights.

The programs are designed to be voluntary. Obviously, there is some pressure involved inherent in the situation because they come about when the employer seeks to reduce their work force. That is the reason the employer is willing to pay out, in many cases, millions of dollars of incentive benefits to reduce the work force and do it in a way to avoid litigation. They could simply lay people off, make the same involuntary decisions. But they are trying to go about it in a way which give the employee some right of self-selection.

But they say to those employees, if you are going to self-select this, then do not come back afterwards and tell me it was not a voluntary choice. Tell me that up front. Tell me that it is under protest and do not take these voluntary benefits. Take your chances with the involuntary program and if you are right, you will prevail in court. The reason we want it to be a voluntary program is to avoid people challenging the involuntary elements of that.

The third part and somewhat assumed in the voluntary programs is the question of the structure of the program itself—the nature of the benefits being offered. Are the benefits themselves discriminatory? Do they offer different benefits based on some factor related to age? Or do they have a cutoff, only offered to a group of employees? In fact, it is interesting to note that we probably see more challenges to these programs not by people who took them, but by people who were not included within them.

The 54-year old who says, I am protected by the Age Act, but I am not old enough to participate in this program. I think it is a great program. I wish I was in the program. It is the people who are challenging the program or why was it only offered to this department and not that department?

But the problems that employers struggle with is the validity of the benefits. There was reference in one of the testimonies to a DuPont program and someone said they read about that program and it being challenged. I have little doubt, although I do not represent DuPont, that they thought what they were doing was legal. They would not embark upon a certain given incentive plan unless they thought it was legal.

The problem is there is very little guidance for employers in this area. As Chairman Thomas testified this morning, they are just at the beginning of the rule making process on what kinds of incentive programs are or are not valid. They are just in the beginning of the rule making process and we find that 90 percent of the Fortune 100 companies have already been doing these, without any rules even been made yet.

So there is some risk in those programs. Employers want to avoid litigation. One of the purposes of the Age Act is to avoid those kinds of disputes, and so they are willing to offer enhanced benefits, if they know that the relationship is going to be terminated, and it is going to be terminated on an equitable basis.

Encouraging the employee to go to the EEOC, not just a lawyer or the EEOC, then come back and say, I am questioning this program? Who are you going to keep? Who is going to replace me? How is this going to be done? The employer then has a choice to make. They can say, we are convinced that we made a fair decision, maybe it was not based on seniority, maybe it was based on performance. And we think this younger employee is a better performer, and we are prepared to defend that in court if we have to.

Or we know the risks in litigation and that is why we are prepared to give you some settlement of that potential claim. You have not asserted a claim yet. We do not know whether it is going to be an age claim or a race claim or a wrongful discharge claim or all of those most likely. We want to terminate this relationship and offer you enough money that satisfies you that you are willing to accept that in exchange for your challenge. Not in your job, that is not the question now, that is in the involuntary circumstances.

So I think that requiring that there be an asserted claim of age discrimination limits the utility of these, and takes away the incentive for at least those 25 percent of the employers and growing number who find that waivers and releases are an integral part of these programs to avoid future litigation, and forces the issue up front if by encouraging people to get advice up front.

Senator **Jeffords**. Ms. Shattuck?

Ms. **Shattuck**. I just have something very brief to say—two points. First of all, the references around the table here today, the severance pay, on how employers will not do away with severance pay. We are not talking about severance pay, we are talking about enhanced benefits beyond that. I want to clarify that for the record.

The second thing is in terms of EEOC doing some kind of pre-approval of advisory opinions. EEOC has had that authority since it was formed almost 25 years ago now. And to my knowledge, and I have been intimately involved with the agency, it has never issued an advisory opinion despite pleas from plaintiffs and defendants and companies and employees alike. It just is not apparently capable of doing that, and I would not rely on that as a way to get a pre-approval system.

Senator **Jeffords**. You do not feel that would be necessary under this legislation, either state it or imply it?

Ms. **Shattuck**. I think that under the legislation as it is now constituted, there would have to be some kind of assertion of a claim. Now whether that assertion goes as far as filing a complaint with the EEOC or simply going and talking to the EEOC and finding out what the rights are, I think there is a difference. And if we are going to go file charges which this will probably encourage, by the way, by telling them where the EEOC is, I would guess that we would have a lot more charges filed, and that is why.

But if it goes beyond that with a written assertion of a claim, and with EEOC a written assertion of a claim is a filing of a charge. And if we have to go that far, that is what we are doing. Otherwise, if you are going to have supervision of the court which is the other provision, you have to file something in the court. You have to file a claim in the court or file a claim with the company.

And as I read the introductory statements that were given with this bill, there is a real bias and almost there are statements to the effect that employers are prohibited from telling the employees that they can notify the employer in writing in order to get the benefits. In other words, we are not supposed to encourage employees to do this as a way to get around your concerns about voluntary knowing waivers.

That is a problem. If the legislation says in order to get this extra program you have to tell us that you think we are discriminating against you, I think most employers would just simply say forget it. We will give them their benefits. We will set up our reserves and if they sue us, fine. And we are sorry we cannot help the employees more.

Mr. **Galland**. I have a comment about this notion. I wonder if rather than saying, forget it. We will just fire you and take our chances, an employer, in my opinion, from the employers I represent, what they would say to themselves is, we will forget about firing this person. We will not take our chances. We do not have a strong enough case. There are too many possible avenues of attack on the grounds of discrimination and instead of just canning Mr. Lancaster, and replacing him by a 28-year-old person, we will keep him on and let him work.

I think that is the reaction of most responsible employers. In my experience, the employers that are using these waivers, are using them because they really have serious problems as they analyze their own program and they expect that there might be a successful lawsuit under the Age Act.

And Mr. Dichter really formulates the problem in its most fundamental philosophical terms. In his view, as I hear it, it is a tough world out there and employers ought to be allowed to put employees to a very tough choice. Take the money or go out without any benefits, without any salary, without any money, and sue us.

Now that is a very tough world and the question is whether Congress wants employees to face that tough world. And I think that the Age Act rightly or wrongly is predicated on a different view of the world than that. I think that this is a protective law. And I do not think that Congress intended the Lancasters of the world to have that kind of brutal choice in a situation where they were not in a position to know whether they ought to take that chance. That is just my fundamental, philosophical opinion.

Senator **Jeffords**. On the other hand, I think that employers have to face the reality if they find that an individual is no longer competent for the job, then rather than offering them the incentives to retire, they have to go through the agonizing matter of letting somebody go without the benefits. And therefore, in essence, you end up with a worse situation.

Mr. **Galland**. I guess that is right, but let us take an employer—let us take the Chicago Park District which I was the general counsel of. We had lots of older employees who were doing a terrible job. We had lots of younger employees who were doing a terrible job. And we had some high level, high paid people who were protected by the Act. We wanted to let them go. We wanted to fire them. And we fired a number of such people. When we did, we offered a number of them some substantial severance benefits. But we did not ask them for a release. We knew that we might get sued, but the advice that I gave to that employer was that the best way to avoid a lawsuit from this employee is to (a) have a good reason for letting this person go, and (b) to treat them with some respect and some decency.

We prepared the way. We let them know they were not doing such a hot job. We gave them some opportunity to improve. And when we called them in, we did our best to let them know that we were sorry that we had to do this. And I think that any defendant's lawyer who has had a tough age discrimination case to defend, might agree that the hallmark of a tough case is that the employer called the employee in and said, there is a reorganization and you are not part of it, and Mr. So and So will escort you to the door. You will have to leave immediately and you have the following benefits, if you will sign the release.

It is amazing the number of programs I have seen that are of that variety and those programs result in a lawsuit, Senator, whether you get a release or not. Releases do not curb litigation when the employee is treated that way. And except for the Lancaster case, they do not get summary judgment.

Senator **Jeffords**. Well, Mary indicated that she thought all waivers were bad in these circumstances and that you ought not to be able to waive your rights. I would like your views on that, starting with Ms. Shattuck?

Ms. SHATTUCK. Waivers are not appropriate as a general rule when unions are involved and a lot of the figures in the GAO report will take into consideration unionized employees. I think that waivers are appropriate if the individuals know their rights and are given time to consider and given some adequate notice. My testimony, I think, speaks to that and I think that we can avoid a no win situation from both parties.

The termination of employment is such a traumatic event whether it is voluntary and a happy traumatic event, or an unhappy one, and I really believe that the employee should have protection of waivers. I think the employer should and also I think the employees should. There are two sides to what you can negotiate and all circumstances differ.

Senator JEFFORDS. Let me ask you this and then I will answer both parts of it. What would be the result of the inability to grant waivers, as far as the employer's perspective goes; would it result in a reduction of likely offers of incentives?

Ms. SHATTUCK. I think it would result in a reduction. Some employers right now, frankly, are looking at just simply going with plant closing and layoff requirements of severance versus notice. I think we would see a reduction and those that have responsible, corporate comptrollers would be requiring the setting aside of monies for a litigation. The question is whether or not employers exceed in litigation. They pay through the nose for the privilege of litigating. And frankly, the damages in an age case are not great. It is the cost of litigating to prove you are right.

Mr. DICHTER. Senator Jeffords, first let me say I agree with Mr. Galland that the best way to handle these situations, and one way that we always counsel our clients is to treat employees with respect and decency and have a good reason for the termination. These are all situations where the employer has determined that it is necessary for them to reduce their work force out of an obligation to their shareholders, out of a situation which requires a reduction in their work force. These programs, particularly the voluntary incentive programs, tend to be very expensive.

In fact, someone commented this morning that only larger companies may be able to afford them. They are done because of the need to reduce the size of the work force and encourage people to leave. There is a very valid debate over the question of should we be encouraging older workers to leave the work force or not. I suppose pension plans and Social Security do just that. They encourage older workers to leave the work force, and the more generous they are, the more it encourages them to leave the work force.

I think that is a debate which we cannot do it obviously in the context of this piece of legislation. But what would be the result of the inability to grant waivers? The choice is not between no benefits and benefits. There are certain benefits which are mandated by law, which may be vested, which employees by policy may be entitled to. The question we are talking about is enhanced benefits. The employer who is willing to pay like, Lancaster Buick, additional money to avoid future litigation.

In fact, some companies have gone so clear as to spell that out in their programs where they have two tiers of benefits. You get X weeks or months of severance pay, as an absolute right. You get X plus Y, if you are willing to sign a release or waiver. The employee has the choice. If they think their case is better in court, they will take the minimum of benefits and go to court. If they think it is not, they will take the enhanced benefits.

This legislation would preclude such programs because we would not have either the bona fide of age discrimination nor would we have any realistic ability of the EEOC to supervise these. And so in those situations, you would be adversely affecting those opportunities for employers. The incentive there simply will not be there. There will still be the incentive to treat people fairly, as there is now, because we have seen challenges to these releases when there is not fair treatment. And I think the effect of this bill will be to discourage those kinds of situations.

As Mr. Galland talked about the economic divorce. I think that is a very real situation, but I would not limit it to the chief executive officer. That is something which goes way down in the spectrum where the employer says, we want to make a change. And we want to negotiate with you a termination of your employment. Bring your lawyer in, we will talk about the terms of that, and let us work it out. But once we agree on that, we do not want you to come back and say that I have been wrongfully discharged. It was because of my religion, my race, my sex or my age. We agreed on the termination of your employment and on the benefits.

If you are happy with that, then let us agree that is all you are going to get. If you are not happy with that, then we will decide. Either you will be terminated or you will not. You will have a lawsuit or you will not. Thank you.

Senator **JEFFORDS**. Mr. Galland?

Mr. **GALLAND**. We have quite a bit of common ground here I think. I think where we disagree nobody really proves one another wrong. The sense that I have from being in this business and counseling employers and employees is that it is a mistake to think that employers run their basic policies because of their fear or non-fear of litigation. Litigation is a cost of doing business and it can be an expensive cost, as Ms. Shattuck pointed out, but an employer that wants to implement an early retirement program implements it because that program will serve its interest, regardless of whether litigation results or not.

And most employers that are ready to undertake an early retirement plan, well know that it can result in litigation and are willing to take that risk. They even know that even if they get releases, it will result in litigation, as many did that we heard today, and they are willing to take that risk.

So it all comes down to how you view employers' behavior. I think that employers in offering severance benefits and in offering early retirement programs are mainly motivated by business considerations, and that litigation is a relatively tangential factor in their decision. It is an annoyance. It is a risk. They would rather not have it, but I do not think that this bill is going to make much of a dent in either practice. Now I cannot prove that, but I think that anybody who has been an employer knows that even though the law is annoying and lawyers are annoying, the main thing that you are looking at is bottom line, and the law is a relatively small part of that.

Senator JEFFORDS. I have just two more questions. It is my understanding from the cases that have come down that there has become a rather general consensus as to the factors that ought to be considered in these cases; is that generally correct? Does anyone disagree with that?

Mr. GALLAND. I am sorry, that what should be considered, Senator?

Senator JEFFORDS. Well, certain factors should be looked at to determine voluntariness and knowingly and those kinds of things; is there any——

Mr. GALLAND. The most recent cases, I think, have a consensus about that. There was—the Lancaster case, I think, just sort of had a footnote saying, we will just treat this under ordinary contract principles. I think courts have sort of gagged on that idea and they do list a bunch of factors. But they also say that they will not tell you which ones are controlling.

Senator JEFFORDS. Assuming that then, it seems to me we have pretty good guidance there as to where to go. And the question then is whether you leave it up to EEOC to do it by regulation, or perhaps it is better to do it by statute to give more formal ways to handle these situations to prevent unnecessary litigation. Anybody disagree with that?

Mr. GALLAND. I guess I do. And the reason I do is because if the EEOC cannot bring itself to level with us as to what the rules really are, it is okay to list a bunch of factors. Courts have always listed factors when they are considering——

Senator JEFFORDS. Is that because you have not seen what they are going to do or is that because you do not believe you want to trust the EEOC? Or you do not believe it is proper for the regulatory body to do that at this point?

Mr. GALLAND. No, no. It is just that the only evidence that we have is what they have been willing to do in the past, and what they want to do is to list factors, but to tell us that we are not going to tell you which of these are required, and, in fact, none of them needs to be there. If the EEOC had been a little firmer with this over the past couple of years, and laid down stronger rules, we might not be here. But they do not seem to want to do that, and that is why we are all here.

Senator JEFFORDS. So yours is a lack of confidence in the EEOC doing what everyone agrees ought to be done, I guess?

Mr. GALLAND. Yes, to be frank.

Senator JEFFORDS. Senator Metzenbaum wanted me to ask this question before we close. And I am sorry to hold you all, but it has been very helpful to me and I imagine you are all hungry. Ms. Jones, did you have any additional comments that you wanted to make?

Ms. JONES. No. I do not think so. I think I have said everything I wanted to say. Thank you.

Senator JEFFORDS. Okay, I did not hear your response to that last question. This is from Senator Metzenbaum. Some employer representatives had questioned whether the EEOC should supervise waivers at all. They argue that supervision will be too subjective and will unduly delay the settlement process. Would you find our bill more acceptable if it said that there could be no waivers at all involving early retirement or other exit incentive programs? I may have sort of asked that myself, but Mr. Galland? We will go down the row here.

Mr. GALLAND. I would not want to change the EEOC's present involvement once a charge has been filed and a dispute arises. That is fine with me. For reasons I said earlier, I do not think much of getting the EEOC involved in pre-clearance operations.

Senator JEFFORDS. Ms. Jones?

Ms. JONES. I think the EEOC ought to continue handling cases when people bring their complaints to them. I would not give them any larger role in that. So I would leave the bill as it is. As far as I read the bill, it requires waivers only in the case of settling disputes or claims, and, I think, that is just exactly what will give it the protection that is needed.

Senator JEFFORDS. Mr. Dichter?

Mr. DICHTER. I think anything that limits the opportunities for individuals to either voluntarily agree on certain terms of a termination and offer a voluntary program is not in the best interest of employees or employers. The courts for hundreds of years in this country have dealt with the question of releases, voluntary and knowing, whether it be in an accident case where someone is asked to accept a sum of money in exchange for their injuries and foregoing their right to a lawsuit or a contract case.

Courts have not had a problem for hundreds of years of dealing with the question of whether or not someone was entering into a knowing and voluntary release of their rights in exchange for consideration. There is nothing particularly unique about this, as long as we deal with the particular issues that have been raised, that is, that the time to consider it, the advice to employees to get counsel, or to go to the EEOC. Once you deal with those concerns, I think we are back in the same situation we are in any other situation where both parties have a right to accept compensation in exchange for giving up certain rights.

The EEOC supervision provision, well I am not sure, I do not think anyone is sure what that really means because that term comes out of the Fair Labor Standards Act where we understood what it meant. They had to pay minimum wage and if you were not paying minimum wage, we were going to make sure you paid them the minimum wage. So that is easy to supervise that. If you did not pay them overtime, pay them overtime. We supervised in making sure the check got paid. The reason the waiver concern was under the Fair Labor Standards Act was if minimum wage was $3.35 an hour and you were paying somebody $2.75 an hour, they could not settle their claim for $3.00 an hour. We understood that, and the Department of Labor would not let them, even if they wanted to because the law says you cannot give up those rights.

But in each of these cases we are dealing with a different set of circumstances. We are dealing with two sides of a story. One says they believe it was age discrimination. The employer says we believe it was not; it was based on valid factors other than age. The truth of that, if there is such a thing, will not ultimately be resolved until a trial of fact decides that and appeals are exhausted.

To avoid that, both parties ought to be free to enter into an agreement that says, let us give up that challenge. There is no specified sum now. It is not $3.35 an hour. The damages are unknown. Because the person may find a job the next day, so we do not know what the damages are, even if they won. We do not know whether you are going to win or not. Let us have a mechanism which says the parties can agree that they will forego any rights to challenge the termination of their employment in exchange for a sum of money.

Senator JEFFORDS. Ms. Shattuck?

Ms. SHATTUCK. I agree with what Mark Dichter said, and I also think that we need to have some means in here for quick resolution of differences, and I do not mean quick by being 24 hours. I mean the considered time. But once you put the intervention of a Federal agency in there supervising or a court, we are talking months if not years. And I just do not think that this is a practical way to go. I think that people ought to be able to resolve their differences, and if we need to tell them how to get help to do that, terrific, we can do that. But I would not go any further than that at this point.

Senator JEFFORDS. Thank you all. I am sorry to have held you so long, and it has been very helpful to me. I am not sure it was to you, but I deeply appreciate it.

I would also like to announce that the hearing record will be open for two weeks for anyone on the committee or otherwise desires to make statements. And although I have been waiting for this one, I have asked unanimous consent that I have the opportunity to answer questions and have questions asked of the panel or others during that period. And it is unanimous, so thank you.

[Additional material supplied for the record follows:]

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LEADERSHIP COUNCIL OF **LC AO** *AGING ORGANIZATIONS*

89 FEB -9

Lawrence T. Smedley, Chairman

February 3, 1989

The Honorable Howard M. Metzenbaum
United States Senate
140 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

We, the undersigned organizations, representing the interests of the older Americans nationwide, wish to express our strong support for the legislation you introduced today--the Age Discrimination in Employment Waiver Protection Act of 1989. This bill provides important and necessary protection for the rights of millions of older workers under the Age Discrimination in Employment Act (ADEA).

The Waiver Protection Act establishes a process by which older workers may validly waive their ADEA rights without supervision by the EEOC or the courts. The bill makes clear that unsupervised ADEA waivers are valid only when obtained in settlement of a specific charge or claim of age discrimination; therefore, employees could not be coerced into signing away their federal rights in order to participate in an early retirement, or exit incentive program. Benefits are offered in these programs not in exchange for settlement of a claim of discrimination, but as an inducement to leave employment.

This legislation is necessary to counter the effects of a rule issued by the EEOC that would have validated ADEA waivers obtained even in circumstances where the employee was unable to know whether an ADEA claim existed. Although this rule was twice suspended by Congress, the EEOC's refusal to modify or rescind the rule provided many employers with a shield against ADEA lawsuits and, effectively, a license to discriminate against older workers.

We applaud your action to preserve and enhance the rights of older workers to equal employment opportunity and look forward to working with you to ensure passage of this important bill.

Sincerely,

Larry Smedley
Lawrence T. Smedley
Chairman

National Council of Senior Citizens

American Association of Retired Persons

925 15th Street, N.W., Washington, D.C. 20005 (202) 347-8800

National Caucus and Center on Black Aged, Inc.

National Association of Retired Federal Employees

Catholic Golden Age

National Council on the Aging, Inc.

Villers Advocacy Associates

National Association of Area Agencies on Aging

National Association of State Units on Aging

National Association of Foster Grandparents Program Directors

National Association of Older American Volunteer Program Directors

National Association of RSVP Directors, Inc.

National Association of Senior Companion Project Directors

America Society on Aging

American Association for International Aging

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Labor
428 Dirksen Building
Washington, D.C. 20510

February 14, 1989

Dear Senator Metzenbaum:

In the upcoming hearings on the subject of unsupervised waivers, I urge Congress to abolish this incidious employer tool that is devasting to the unprotected salary and hourly worker. As a former General Motors employee who was coerced into signing such a document; I speak from experience.

As a District Sales Manager with the world's largest automobile manufacturer, General Motors Corporation, many older employees in our group were denied their Civil Rights. At the time of our termination we were not informed of of our legal rights nor aware of any recourse. The termination became effective March 31, 1987; however, I relunctantly signed the unsupervised waiver on March 23, 1987. (enc. 1)

It was not until ten months later that I read in the newspaper about the ADEA law. On January 6, 1988, I filed a charge of Age Discrimination against General. (enc. 2) On August 25, 1988, The Equal Employment Opportunity Commission rendered a Determination in favor of General Motors Corporation. (enc. 3)

Under the Freedom of Information Law, I received material from the EEOC that General Motors gave them regarding my charge. This material signed by a Senior General Motors Personnel Administrator was false and misleading. To be precise, General Motors lied to the Federal Investigator in my case. (enc. 4)

On October 13, 1988, I submitted a request for review of the EEOC Determination to the EEOC Determination Review Program. On November 3, 1988, I received a letter from the DRP of the acceptance of my appeal. (enc. 5)

On February 2, 1989, I received another letter from the DRP stating that my case would be throughly reviewed and possibly go beyond the allowed time for suing in Federal court and that I should seek legal counsel. (enc. 6)

This is confusing because in the EEOC Determination, page 3 last sentence states: "If Charging Party files a private law suit while a request for review is under consideration by the Determination Review Program, the Commission may terminate the administrative process"

Now the EEOC is telling me to get legal assistance or I may lose my right to sue General Motors altogether. As I see it, due to the unsupervised termination on March 31' 1987 and not being informed of my Civil Rights, I am almost a year behind adjucation of my charge.

I do not agree with the EEOC Determination; therefore, my appeal to the Determination Review Program. I believe my termination along with older co-workers came under circumstance whichgive rise to an inference of age discrimination. The methods used to terminate General Motors' employees are too subjective, particularly middle management and older employees. Corporate culture, the "old boy, old girl" net work, favoritism and obligations owed prevail. These are long established techniques that prevent objective termination.

What happened to me an some of my co-workers in our group is not an isolated case. Notwithstanding General Motors or the US Chamber of Commerce position on the subject.

Today, the unprotected salaried and hourly employees are at the mercy of Corporate America. In General Motors alone by the end of 1989 over 25% of its workforce will be terminated. Older employees are vulneralbe, albeit, competent and still productive are discarded in favor of younger, less experienced and lower paid employees.

Corporations are running scared and are looking for quick solutions to a very serious problem that is:"AMERICA LOSING ITS LEADERSHIP IN WORLD MARKETS".

An edict comes down from the board rooms, cut costs in order to meet world competition- THE PACIFIC SYNDROM. Immediately, corporate personnel directors scurry around and look for ways to get rid of employees. They attend seminars conducted by lawyers showing them how to do it and stay within the Civil Rights laws. Department managers are given wide discretionary authority regarding dismissals. As a result workers' Civil Rights are violated as had happened in my case.

The use of the unsupervised waiver is weighted in favor of the employer. In large corporations like General Motors mass terminations are too easily abused. I therefore request this committee to reconsider the one year extension on the prohibition of the unsupervised waiver and abolish it permanently.

To use a phrase that is popular today:

"GIVE THE AMERICAN WORKER A LEVEL PLAYING FIELD".

Sincerely
Charles A Boland
Charles A. Boland

GENERAL MILLS, INC. · EXECUTIVE OFFICES · Number One General Mills Boulevard · Minneapolis, Minnesota

March 14, 1989

TALMADGE L. BARTELLE
Senior Associate Counsel
(612) 540-3148

The Honorable Howard M. Metzenbaum
Chairman
Senate Labor and Human Resources Committee
SR-140 Russell Senate Office Building
Washington, D.C. 20510-35102

Re: Bill To Amend The Age Discrimination In Employment Act (ADEA)
(Hereinafter S.54)

Dear Mr. Chairman :

Because of the vital importance of the referenced Bill to employees, employers and other tax payers, I am respectfully requesting herein that this letter be accepted and made a part of the record of proceedings.

For the past 17 years I have been and continue to be quite regularly involved with settlement of employment discrimination claims. My experience leads me to share the view often expressed by the courts that the legitimate, constructive interests of employers, employees and the public are best served by the implementation of claims preventative measures and by the early voluntary resolution of disputes. In my observation S. 54, if it becomes law as presently introduced, will serve principally to discourage settlement, not by alerting unwary, potential charging parties to previously unrecognized rights but by confusing the parties about the legal requisites of a binding settlement.

I accept that the impetus for S.54 was a concern that victims of unfair discriminatory practices under ADEA were waiving their rights to redress without fully appreciating the scope of those rights. However, S.54 does not add to protections against abuse which are already established in the common law. I am sure you are aware that under the common law, waiver and release are affirmative defenses subject to contractual principles which a party must plead and bear the burden of proving. This burden of proof clearly extends to demonstrating that the asserted waiver was both knowing and voluntary when made. In addition, mutual mistake, fraud, undue influences, lack of consideration, and all other contractual theories of avoidance are available

Mailing Address: P.O. Box 1113, Minneapolis, Minnesota 55440

to the party against whom waiver is asserted. S.54 does not augment these principles rather, its major effect will be to raise questions about whether legitimate enforceable settlement is possible without the prior involvement of a governmental agency or the courts. The declaration of Sec. 2 (f)(1) of S.54 that an individual may not waive any right [under ADEA] without the supervision of the EEOC or a court and then only in settlement of a "bonafide claim" under ADEA, will have a very chilling effect on voluntary, private efforts at conflict avoidance. It also appears inconsistent with the long-established national public policy favoring the amicable settlement of disputes and the consistent efforts of judges, agency representatives and legislators over the years to foster early private settlements. If there has been one hallmark of the overall statutory scheme in the area of human rights in the workplace, it has been the rather complex and unique administrative mechanism which has been created to process claims. Unusually strict limitation periods and rather complex procedural prerequisites to litigation, at both the state and federal level, have all been designed to facilitate early contact between the parties themselves for the purpose of resolving incipient disputes. These are variously labeled "pre-determination settlement" processes, "fact-finding conferences", "preliminary settlement conferences", "initial consideration overtures" on up to the involvement of outside mediation services, and all have served this same end. All of these procedures have defined mutually satisfactory settlements to be a desirable end, even when negotiated strictly between the parties themselves, without significant outside guidance and prior to any "discovery", structured disclosure or education.

It is my perception that the actual impact of S.54 will be seldom, if ever, felt by employers seeking quickly to extract a waiver from a present or departing employee before that employee appreciates that he or she has a basis to bring a claim under ADEA. The real impact of S.54 is on the situation where, for any number of reasons an employer determines that it must terminate the employment of a particular individual or individuals in a fashion which will impose minimum stress on both parties. A layoff or discharge discussion is almost always very difficult for a supervisor to make and to implement. It is in this kind of context that the supervisor seeks authority to "soften the blow" and to smooth potential friction through the medium of some ad hoc "separation package". In the typical circumstance, the potential friction is much more of a personal than a legal nature as evidenced by the fact that separation packages are so frequently "negotiated" with departing employees who fall into no statutorialy protected class and who have no particular legal claim to bargain away. When the employer is inclined to agree to extraordinary separation pay in such a setting, it reasonably asks that it at least receive in exchange a comprehensive waiver of any possible future controversy arising out of past events. Especially in this day of novel common law liability theories which challenge traditional "employment-at-will" principles, the parties cannot pretend to fully anticipate all possible courses of action. They simply understand that the departing employee is accepting a given amount of money or other consideration in exchange for a final peace. The parties are protected by the common law from coercion, later-discovered misrepresentation or any other circumstances which might lead one reasonably to conclude that the waiver was not both knowing and voluntary. Lawyers or managers who are asked to pass judgment on whether such extraordinary separation payments are a justifiable diversion of company assets reasonably feel the need to offer assurance that the payments not only will foster goodwill but also will bring final, amicable termination to the employment relationship. If such a company representative feels he or she must first encourage commencement of formal adversary proceedings before being able to make that assurance then more conservative approaches to separation payments come to appear to be the only prudent alternative.

Of course, to require persons predisposed to reaching a final binding peace between themselves to avail themselves of a governmental agency or the courts is hardly to serve the interests either of taxpayers or of other aggrieved charging parties in more urgent need of these limited and seriously over-burdened (and many times underfunded) resources of the government.

While S.54 mentions the "knowing and voluntary" standard it is my observation that when well-established common law principles become the subject of legislation, new questions of interpretation eventually arise about the effect of the [illegible] principles.

Moreover, extensive research indicates that courts will always offer relief to those from whom waivers and releases have been unfairly extracted. Given the critical and growing need for private dispute resolution in our society, it seems that new statutory language which places limits on private settlements and injects uncertainty into otherwise clearly recognized ground rules for construing the validity of releases fails to achieve a constructive purpose.

Based upon my substantial interaction with employers nationally, there appears to be a consensus that they have absolutely no objection, and also feel that it is right and proper, to give a potential releasor clear notice as to the rights that he or she is waiving in exchange for a gratuitous payment by the company. Moreover, employers recognize that it is in their enlightened self-interest to have the assurances that a terminated employee who is targeted to receive such recognition is made aware of his right to counsel and a reasonable period of time in which to make an informed judgment regarding the rights that he or she is waiving.

The concerns regarding individuals being unfairly disadvantaged by improvidently waiving his or her rights are clearly addressed by Section 2(F) (2) (A) through (E). It seems quite cumbersome and unnecessary to require that such waivers relate to a "bonafide claim", or to require a reportedly backlogged U.S. Equal Employment Opportunity Commission to be burdened in every case, where an employer and an employee seek to part company on a mutually satisfactory basis, to receive a charge (where none may exist) and to supervise a general release which is knowingly and voluntarily made. Such an intervention does not serve a purpose directed toward a solution to Congressional concerns. If anything, it will have a prejudicial effect on the class of individuals sought to be protected by severely restricting the opportunities for companies to make these gratuitous payments.

Sincerely,

TLB:vh

KRAFT

JOHN J. TUCKER
SENIOR VICE PRESIDENT
HUMAN RESOURCES

March 15, 1989

The Hon. Howard M. Metzenbaum
Chairman, Sub-Committee on Labor
The United States Senate
SR-140
Russell Senate Office Building
Washington, DC 20510-3502

Dear Senator:

I write on behalf of Kraft General Foods ("KGF") to discuss our concerns with S. 54, the proposed "Age Discrimination in Employment Waiver Protection Act of 1989", and request that this letter be made a part of the hearing record for S. 54. For reasons more fully explained below, it is our view that the proposed legislation is not in the best interest of all employees; that it is broader than is necessary to meet its underlying objectives; and that its objectives can substantially be met with an alternative approach to the legislation.

The proposed legislation is troublesome in two respects:

- It significantly restricts an employee's right to release age discrimination claims, thereby substantially reducing the incentive of the company to offer generous severance benefits.

- By requiring judicial or EEOC approval of such releases, it effectively encourages terminated employees to make claims (even frivolous ones) so that these tribunals can assume jurisdiction simply to approve the release.

Today's business environment is highly competitive and all companies must be mindful of opportunities to maintain workforces at essential levels. While the pressures of competition have necessitated workforce changes, legal developments have increased the risks of litigation associated with these changes. In order to manage these risks, companies like ours have significantly improved their severance benefits for employees on the condition that terminated employees release their rights to litigate.

Where we have required releases, they have been written in language as simple as possible. Employees are told that the release covers age claims, other discrimination claims, breaches of contract and related wrongful discharge claims. The release also contains language designed to highlight the fact that the employee does not have to sign it, and that the employee should consult counsel. In recent years, numerous employees have left the company with enhanced separation benefits for which they had signed such a release.

In reality, the reaction of employers to the alternatives under the proposed legislation is entirely predictable. Rather than encouraging terminated employees to instigate age discrimination claims for the purpose of obtaining judicial or EEOC approval of releases, companies will surely reduce the severance benefits that they provide to terminated employees. An additional consideration is that severance benefits provided to employees who are not protected by the Age Discrimination in Employment Act may be reduced because it would be imprudent for employers to differentiate in offering severance benefits.

In addition to the fact that the legislation will encourage employers to deprive separating employees of valuable severance payments, it will also discourage the settlement of many types of employment litigation. Often, employers seek full releases, of all possible claims, when they settle lawsuits, charges and informal claims. It is logical that an employer, when settling, for example, a race-based discrimination or a breach of contract claim, is desirous of ending all possible future claims by the same employee through a full release.

With regard to the legislation's attempt to clarify the standards for achieving a valid release, a review of recent cases indicates that there is no court which will not give a person relief from a coerced or unfairly obtained release. This legislation does nothing more than codify, with significant other restrictions, the factors that any employer, hoping to assert a release against future claims, must be able to show. Prudent employers take steps to ensure that a release will not be overturned based on the absence of voluntariness, lack of sufficient time to consider it, lack of opportunity to consult counsel, and related factors set out in numerous court opinions.

If anything, the legislation as currently proposed threatens those situations where a willing employee and willing employer wish to make a bargain between themselves. It threatens, especially, the availability of special separation payments to employees who are covered by the Age Discrimination in Employment Act, and those who are not. Sadly, it discourages such payments at a time when many employees need them the most. It promises to delay the disposition of virtually every type of non-age claim or lawsuit and imposes upon limited governmental resources a function which, until now, parties have been encouraged to resolve through a variety of private dispute and conciliation mechanisms.

For these and other reasons, we urge that an alternative to S. 54 be considered. The adoption of legislation that permits waivers to be created between an employer and employee, yet which sets forth standards for such waivers and mandates that employees be provided a specific notice, such as that attached to this letter, would appear to meet the objectives of S.54 and would obviate or lessen many of the other concerns I have outlined above.

KGF is a food manufacturer and distributor with sales of nearly $23 billion annually and 101,000 employees throughout the world. The KGF companies have processing, warehouse and sales facilities in almost every state.

Thank you for the opportunity to raise the foregoing points and for your consideration of our proposed alternative to S. 54.

Sincerely,

John J. Tucker /dl

John J. Tucker

cc: The Hon. James M. Jeffords
The United States Senate
SD-530
Dirksen Senate Office Building
Washington, DC 20510-4503

The Hon. Thad Cochran
The United States Senate
SR-326
Russell Senate Office Building
Washington, DC 20510-2402

The Hon. Tom Harkin
The United States Senate
SH-316
Hart Senate Office Building
Washington, DC 20510-1502

The Hon. Spark M. Matsunaga
The United States Senate
SH-109
Hart Senate Office Building
Washington, DC 20510-1101

The Hon. Barbara A. Mikulski
The United States Senate
SH-320
Hart Senate Office Building
Washington, DC 20510-2003

The Hon. Strom Thurmond
The United States Senate
SR-218
Russell Senate Office Building
Washington, DC 20510-4001

PROPOSED NOTICE

All employers are required by law to provide employees with this notice if the employer is requesting any employee to execute a waiver or release of rights or claims under the Age Discrimination in Employment Act (ADEA). The law also requires that any employee requested to execute a release or waiver be given at least 20 days to consider such offer.

Before any employee executes or signs a waiver or release of rights, it is important that the employee fully understands what rights are protected by the ADEA and the consequences of signing a release or waiver.

The ADEA protects employees and applicants for employment who are 40 years or older and makes it unlawful for any employer to discriminate against any protected employee or applicant for employment on the basis of age. Specifically, the law prohibits employers from selecting persons for termination or layoff on the basis of age. If you believe that you have been selected for termination or layoff or forced to retire on the basis of your age, you have a right to file a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC will investigate your charge and if it is determined that you have been subjected to age discrimination, seek the appropriate remedy. Such remedy may include reinstatement, back pay or other relief. If appropriate relief cannot be obtained voluntarily from the employer, an action may be filed in the U.S. District Court.

If you have any questions concerning your rights under the ADEA you should seek the assistance of the Equal Employment Opportunity Commission. The nearest office is located at ________________________________, phone # ________________________. Alternatively, you should seek the advice of an attorney.

If you sign a release or waiver you may lose your right to recover damages or obtain other appropriate relief.

APPWP
Association of Private Pension and Welfare Plans

Howard C. Weizmann
Executive Director

March 15, 1989

The Honorable Howard Metzenbaum
Chairman

The Honorable James Jeffords
Ranking Minority Member

Subcommittee on Labor
Senate Labor and Human Resources Committee
607 Senate Hart Office Building
Washington, D.C. 20510

Dear Senators Metzenbaum and Jeffords:

The Association of Private Pension and Welfare Plans (APPWP) wishes to express its opposition to S. 54, which would restrict the use of Age Discrimination in Employment Act (ADEA) waivers in conjunction with early retirement incentive programs. The APPWP, an organization of over 400 employers and employee benefits professionals, respectfully requests that this letter be included as part of the official hearing record for the Subcommittee on Labor's hearing on S. 54 to be held March 16, 1989.

The APPWP and its members are very concerned that S. 54 will seriously disrupt the ability of both employers and employees to participate in, and benefit from, voluntary early retirement incentive programs. Early retirement agreements provide employees with increased pension and/or severance benefits in exchange for voluntarily electing to retire early. Waivers of ADEA claims are an indispensable part of many early retirement agreements. They grant employers the assurance that in addition to providing a costly and generous retirement incentive, employers will not also face groundless ADEA claims which can be very costly to litigate.

Simply put, without the availability of waivers, many employers will forego offering early retirement incentive programs and that will prove to be detrimental to employers and employees alike. S. 54 is inadvisable for several reasons:

First, it undermines an important objective of ADEA, which is to promote voluntary out-of-court settlement of claims. S. 54 encourages litigation by prohibiting certain waivers of ADEA claims and by encouraging the filing of age discrimination charges. The Equal Employment Opportunity Commission (EEOC) administrative process and the federal courts are already clogged with ADEA claims. If private settlement are made more difficult, the administrative and judicial burdens will increase.

1331 Pennsylvania Ave., N.W. • Suite 719 • Washington, D.C. 20004 • (202) 737-6666 • Fax: (202) 638-4018

Second, the bill is contrary to existing ADEA case law, and to carefully crafted EEOC regulations, which already assure that only "knowing and voluntary" waivers will bar claims under ADEA. The bill is also inconsistent with long-standing law under Title VII of the Civil Rights Act, which likewise upholds "knowing and voluntary" private settlements.

Third, by restricting the use of waivers as part of early retirement incentive programs, employers would be discouraged from providing severance programs--a lawful and compassionate practice which cushions necessary work force reductions.

For the reasons expressed above, the APPWP opposes S. 54. If the Subcommittee on Labor believes that problems exist with respect to the voluntariness of early retirement incentive programs, the APPWP would be pleased to work with the Subcommittee members to address those concerns.

Sincerely,

Howard C. Weizmann,
Executive Director

International Business Machines Corporation

Office of IBM Director of Employee Relations

Old Orchard Road, Armonk, NY 10504

March 21, 1989

Senate Labor Subcommittee
The Honorable Howard M. Metzenbaum, Chairman
Hart Senate Office Building - SH608
Second Street and Constitution Avenue, NE
Washington, DC 20510

Dear Senator Metzenbaum:

On behalf of International Business Machines Corporation, I am submitting the comments in the attached statement in opposition to Senate Bill 54 and request their inclusion in the record of the hearings on the bill.

The effect of this bill would be to make it impractical to obtain releases of ADEA claims in negotiations between employees (current and former) and an employer, even when the employee is represented by an attorney. This bill would thus supersede numerous federal appellate court decisions upholding ADEA waivers where "knowing and voluntary."

As more fully explained in the attached statement, this will have an unfortunate effect in cases where an individual claims discrimination covered by Title VII of the Civil Rights Act for termination or some other employment decision. If the person is 40 or over, there would be no bona fide way to settle the claim in such a way as to preclude a later claim the employment action was taken because of age. This would, therefore, have a chilling effect on the settlement of Title VII and other non-age employment-based claims as well.

Last June, IBM announced a departure incentive program (the Financial Assistance Program) covering most employees in IBM's headquarters operations and at two IBM manufacturing plants. About 6,500 employees voluntarily left the company under this program, and each of them signed a general release as a condition of participation in the program. IBM considers the right to require an enforceable release of all employment-based claims in exchange for the significant consideration given as part of such programs an important one. There is no reason an employer should be expected to make these significant payouts and then have to bear the high costs of litigating ADEA claims with the recipients. Those employees who do not wish to execute a release can choose in such voluntary programs not to resign or retire, but instead to decline the offer and remain on the job.

I respectfully request my letter and the attached statement be included in the subcommittee's hearing record.

Sincerely,

J. G. Parkel

JGP:mr
Attachment

STATEMENT OF THE INTERNATIONAL BUSINESS MACHINES CORPORATION TO THE UNITED STATES SENATE LABOR SUBCOMMITTEE OF THE LABOR AND HUMAN RESOURCES COMMITTEE
MARCH 21, 1989

IBM is pleased to submit comments on S.54 because of the importance IBM attaches to its ability to settle and avoid potential disputes with its employees and former employees arising during employment or its termination.

IBM has long utilized releases to settle claims and potential claims of employees and former employees in situations other than large scale retirement/resignation incentive programs. Releases have been routinely used in these individual cases in exchange for consideration which IBM would not otherwise be obligated to provide. The purpose of this consideration is always, at least in part, to achieve repose as an outcome of the process. Creating an exception for the settlement of any claims or potential claims under the Age Discrimination in Employment Act (ADEA) would make it impossible to achieve a state of repose with respect to any person 40 years of age or older unless that person accuses the company, in writing, of discrimination based on age. For example, if an employee claimed race or sex discrimination and a settlement of that claim occurred which involved a substantial payment by the company and general release from the claimant, the employee would still, under S.54, be permitted to bring an action under ADEA based on the same facts, by claiming that, on reflection, he believed he had suffered age discrimination. In other words, whatever the nature of the possible claims concerning employment, these could not be resolved while there remained a significant prospect of an ADEA claim because the settlement general release would be made unenforceable by S.54 as to age discrimination claims. This could have a severe and undesirable effect on the settlement of Title VII and other employment-based claims.

With respect to early retirement/resignation incentive programs, IBM has found it necessary to offer such programs in order to balance personnel resources with personnel requirements on various occasions over the years. IBM has maintained, for almost a half-century, a practice of full-employment whereby the company has avoided layoffs. IBM views it as extremely important that there be no legislative action taken which adversely affects IBM's ability to offer voluntary programs to its employees. One important factor to be considered in offering voluntary incentive programs is whether an employer is able to obtain the same degree of repose through a waiver and release process (as part of such an incentive program) as occurs in an individual settlement situation.

In the case of the program, as well as in the case of the individual settlement situation, the company comes forward with financial payments and other inducements which it is not obligated to provide. IBM offered such a program (called Financial Assistance Program) to some of its employees most recently in June 1988. Approximately 6,500 employees at IBM headquarters locations and Boca Raton, Florida, and Tucson, Arizona, plants have left or will be leaving the company under this voluntary program. In view of the increase in the amount of litigation in the employment law area, the practice on the part of IBM in the past not to use releases in such cases was reviewed. The exposure to the company for double expense (once to incent the voluntary departure, and once again to litigate the claim) was deemed unacceptable. Consequently, the program contained the requirement that a release of all employment claims, including those of age discrimination, be executed by persons who chose to retire or resign under the program. IBM has thus recognized that it is just as important for the company to obtain a release of claims as part of these incentive programs as it is in the case of an individual settlement situation.

The requirement in S.54 that a release be supervised by the EEOC or a court in order to be enforceable is tantamount to declaring enforceable releases to be unattainable. This is so simply because the EEOC and the courts will not have the resources to handle the volume and complexity of the review. Moreover, companies need to conclude these programs within a reasonable time frame, but the imposition of supervision by a bureaucracy would thwart that objective. If the impetus for supervision emanates from a desire to assure that the waiver/release is knowing and voluntary, that can be achieved by applying the EEOC's rule or specifically legislating such a standard. Such a standard could include the requirement that a specific minimum period of time (e.g., 20 days) be given to the employee to consider the release and seek legal and other advice covering it before it must be executed. Coerced waivers/releases would thus be invalid and no barrier to making age or other claims against the employer.

IBM appreciates this opportunity to explain IBM's views on this very important matter and to clarify for the subcommittee the extent of IBM's use of releases covering claims and potential claims, including those of age discrimination, by employees and former employees.

IEEE
UNITED STATES ACTIVITIES
Promoting Career and Technology Policy Interests of Electrical, Electronics & Computer Engineers

United States Activities Board

Technology Activities Council
Aerospace R&D
Committee on Communications & Information Policy
Committee on Man & Radiation
Defense R&D
Energy
Engineering R&D
Health Care Engineering Policy
Technology Issues
U.S. Competitiveness

Government Activities Council
Congressional Fellows
Legislative Report
National Government Activities
State Government Activities
Technology Policy Conference
Technology Transfer
Washington Internship for Students of Engineering

Member Activities Council
Awards & Recognition
Communications
Continuing Engineering Education
Employment Assistance
IMPACT
Opinion Survey
Precollege Education
Professional Perspective
Salary Survey

Professional Activities Council for Engineers (PACE)
PACE Regional & Divisional Activities
PACE Information/Workshop
Student Professional Awareness

Career Activities Council
Age Discrimination
Career Maintenance & Development
Ethics
Intellectual Property
Licensure & Registration
Manpower
Pensions
Women & Minorities

IEEE-USA Office
(202) 785-0017

"Information Line" Recording
(202) 785-2180

Facsimile/Telecopier
(202) 785-0835

March 24, 1989

Howard Metzenbaum, Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
608 Hart Senate Office Building
United States Senate
Washington, DC 20510

Subject: Statement for Record of Subcommittee Hearing, March 16, 1989

Dear Mister Chairman:

As Chairman of the United States Activities Board of the Institute of Electrical and Electronics Engineers, Inc. (IEEE), I appreciate this opportunity to express support of the U.S. members of the IEEE for legislation that limits unsupervised waivers of rights under the Age Discrimination in Employment Act to instances where there is a settlement of a specific claim of age discrimination against an employer. We believe that in all other instances where waivers are used, the process should be supervised by the U. S. Equal Employment Opportunity Commission.

First, a word about the Institute: The Institute of Electrical and Electronics Engineers, Inc. is comprised of more than 300,000 electrical and electronics engineers, some 235,000 of whom reside in the United States. The average age in 1988 of the members of IEEE was forty-four. Thus, over half of our membership is protected by the Age Discrimination in Employment Act.

Since technology moves at such a rapid pace, older engineers are often victims of the stereotype that their knowledge is outdated and their experience is not relevant to state-of-the-art research. Thus, engineers have always been particularly hard hit by age discrimination in employment.

These same engineers are hardest hit when American industry embarks on layoffs and reductions-in-force programs. They are called into corporate offices, hit with the disastrous news and then given only a few days to make decisions that will affect the rest of their lives. They must waive rights for an offer of increased benefits at a time when

IEEE-USA, 1111 - 19th Street, N.W. Suite 608, Washington, DC 20036-3690
The Institute of Electrical and Electronics Engineers, Inc.

they have little or no idea what those rights might be. How can they know at that point in time whether or not only older workers are being fired or if there is some pattern of discrimination in the actions of the company from which they have recourse.

Older engineers have recently begun to face the dilemma of early retirement incentive programs. The fact that these programs are based on the theory that the older worker is the most expendable is not lost on them. Employees participating in these programs are effectively forced to waive their right to file a claim by conditioning these incentive programs upon the signing of a waiver. The threat, real or perceived, is obvious to the employee, but the long term effects of signing the waiver are not.

The EEOC assures us that an individual can still file charges under ADEA, even if he or she has signed this waiver. Unfortunately, in these cases the plaintiff must also prove that the waiver signing was not "knowing and voluntary."

Concerning the larger issue of blanket waivers, we must ask why companies require such waivers if they have dealt with employees in a fair and legal manner. We believe that waivers should be utilized only in special instances where the procedures of the Fair Labor Standards Act are followed, as the ADEA specifically mandates, and that they be thoroughly supervised by the EEOC.

If the United States is to maintain its preeminent technological position in this world, we must utilize the skills and knowledge of all our engineering professionals. The 235,000 United States members of the IEEE, young and old, are ready to accept this challenge.

In conclusion, the IEEE U.S. Activities Board commends you and other distinguished members of the Senate Subcommittee on Labor for holding public hearings. We respectfully request your cooperation in working with the Subcommittee, the Congress, IEEE, and other concerned organizations to press for an end of the use of age as a criterion when making employment or personnel decisions, or in matters of compensation or benefits, or any other matters relating to employment. (See attached Position Statements.)

Thank you.

Sincerely,

Edward C. Bertnolli

Edward C. Bertnolli
Chairman, United States
Activities Board

IEEE
POSITION
PAPER

AGE DISCRIMINATION

The Institute of Electrical and Electronics Engineers, Inc.
1111 19th STREET, N.W. WASHINGTON, DC 20036-3690
(202) 785-0017

Engineers consistently have demonstrated their ability to improve the quality of life for all inhabitants of the world. Engineers who employ the forces and materials of nature for the benefit of society are vital to the process of improving the quality of life for all peoples. The continued development of old technologies and the infusion of new ideas to produce new technologies require superior intellectual ability and experience in engineering and, therefore, need highly sophisticated, ingenious people. This high level of capability and ingenuity on the part of engineers is achieved in part through formal education but, more important, through experience in dealing with technical problems. Thus, as an engineer gains experience, he or she should grow in technological stature as well. They should become more valuable to society as they grow older, and a vast bulk of the engineers of the world do just that.

Employers of engineers have the obligation to provide a work environment that fosters the engineer's growth in technological stature of engineers through job assignment, formal and informal education opportunities and through professional and technical peer contact.

Engineers have the obligation to continue to grow in their professional dimension through study, participation in technical conferences and meetings, and utilization of open and inquiring technical minds to solve problems facing society. Engineers who do continue to grow in their ability to solve society's problems should have the opportunity to exploit that expertise as they increase in age.

IEEE notes, however, some evidence that indicates that some industries in a rapid technologically changing environment are prone to display bias against older engineers. The IEEE is as opposed to discrimination because of age as it is against other forms of discrimination since biases of any nature, including those of age, are inimical to society's best interests and those of the engineer. The IEEE calls upon industry, government, and educational institutions to examine their practices to assure the profession that such age biases do not exist in their endeavors. The IEEE, in turn, will make every attempt to prevent age bias from existing and encourages the adoption of programs by all employers of electrical and electronics engineers to ensure the efficient, proper and humane utilization of experienced, middle-aged and older engineers.

(Reaffirmed by the IEEE Board of Directors on 2/20/87)

IEEE Board of Directors	9/18-19/75
Approved	Date

ENTITY POSITION STATEMENT

AGE DISCRIMINATION BY EMPLOYERS OF ENGINEERS

The Institute of Electrical and Electronics Engineers, Inc.
1111 19th STREET, N.W. WASHINGTON, DC 20036-3690
(202) 785-0017

It is the position of the United States Activities Board that engineers:

* are important resources to modern technologically oriented enterprises.

* employ their knowledge and experience to improve the quality of life.

* have acquired an education and of necessity must continue technical training to maintain their education current throughout their careers.

* seek varied and challenging problem-solving opportunities, which make them a unique asset among employees.

* possess unique traits, skills and analysis/synthesis capabilities that are not widely distributed among the universe of employable persons.

* become more valuable with age because of their experience when they maintain their technical expertise.

* deserve an opportunity to pursue lifetime careers in engineering and should not be underutilized as technicians.

-over-

United States Activities Board	July 16, 1988
Approving Entity	Date

It is the position of the United States Activities Board that employers of engineers:

* should refrain from all practices of age discrimination, including dismissal because of age, demotions because of age, failure to promote because of age, failure to hire because of age, unfair salary practices related to age.

* should be sensitive to their obligations to their human resources on which the destinies of the enterprise depend.

* should manage in a manner that would motivate all engineers regardless of age towards high productivity and high morale.

* should provide equal opportunity to all age levels of engineers to receive continuing education and training through formal courses and challenging assignments.

* should give proper recognition and promotions based on merit, regardless of age.

* should recognize that experience acquired during a career has considerable value to the enterprise.

AARP

April 5, 1989

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The American Association of Retired Persons (AARP) requests that this letter be included as AARP's Statement for the Record of the hearing on March 16, 1989 of the Subcommittee on Labor regarding the Age Discrimination in Employment Waiver Protection Act of 1989 (S. 54).

AARP testified regarding the issue of waivers under the Age Discrimination in Employment Act (ADEA) in the 100th Congress before the Subcommittee on Labor on May 24, 1988. A copy of AARP's testimony of that day is attached to this letter.

AARP strongly supports the Waiver Protection Act. If passed, the Act would insure that unsupervised waivers of ADEA rights by older workers are valid only if obtained in settlement of a claim or allegation of age discrimination and only if the waiver itself satisfies the criteria established in sec. 2 of the Act.

The Act would change current law (which renders unenforceable unsupervised waivers of ADEA rights) by establishing for the first time a mechanism for obtaining valid, unsupervised ADEA waivers. It makes clear that, in order to have a valid unsupervised waiver, the employee must have made a specific claim or allegation of age discrimination against the employer which is being settled by the release. This change is made necessary by the confusion generated by conflicting court decisions on this issue and the increased use by employers of waivers as a condition of receiving enhanced benefits in mass termination, layoff and early retirement or exit incentive programs.

There are many advantages to this change in the law. First, it ensures that the waiver is the result of a true negotiation between employee and employer, and that any consideration for the waiver is independent of money or benefits universally offered to a group of employees.

Second, it ensures that older workers are not asked to sign away their ADEA rights at a time when they are generally unable to determine whether they have been a victim of unlawful age discrimination. A "voluntary and knowing" waiver is meaningless

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

Louise D. Crooks *President* Horace B. Deets *Executive Director*

if, at the time the waiver is signed, the employee has no access to information that would lead him or her to believe that age discrimination played a role in the termination of employment. Indeed, one of the purposes for statutes of limitations for filing charges is to provide an employee with a period of time in which to discover the facts and information needed to decide whether he or she has been a victim of discrimination. A waiver signed in the absence of a claim defeats this important goal and cannot be termed "knowing."

Third, it encourages employers to structure enhanced benefit and other termination programs so as to comply with the ADEA. In contrast, if you permit employers to obtain waivers as a condition of participation in such programs - and not in settlement of a claim of discrimination - employers are free to structure and implement these programs in ways that violate the ADEA.

Notwithstanding AARP's support for the bill as introduced, some of the witnesses at the hearing on March 16, 1989 highlighted issues that we agree are worthy of further consideration.

1. EEOC Supervision. The EEOC, and a number of other witnesses, expressed concern that the Act could dramatically increase the EEOC's workload by requiring it to supervise thousands of waivers annually and give advisory opinions on the legality of enhanced benefit programs.

AARP does not believe the Act requires the EEOC to supervise waivers, even if requested to do so, in the absence of a formal charge alleging age discrimination. AARP understands the statute as directing the EEOC to adopt a practice similar to that of the Department of Labor, which refuses to supervise - and hence validate - waivers of rights under the Fair Labor Standards Act except in settlement of a complaint filed with the Department.

Nor does the Act require or authorize the EEOC to determine the legality of enhanced benefit programs not the subject of a charge or complaint. For a number of reasons, including the absence of published ADEA compliance guidelines for such programs, it is doubtful that such advance determinations would be binding on the parties or would be considered "supervision" of a waiver.

Nonetheless, AARP recognizes that the structure of this bill may encourage employers to seek EEOC supervision of waivers, particularly in enhanced benefit programs, in the absence of claims of discrimination. This would be undesirable from both the employees' and the EEOC's perspective.

AARP believes that the bill should be amended to apply the requirements of secs. 2 and 3 to all ADEA waivers, whether supervised or not. The EEOC would remain free to supervise waivers obtained in settlement of charges filed with the Commission, as they do now, but those and all other waivers would have be held to the same standards. This not only eliminates the EEOC's concerns about an increased workload, but provides the clearest guidance to the courts, employers and employees.

2. Employer Education Programs. AARP agrees with those witnesses who suggested that employers be required to educate and inform their employees as to their ADEA rights. We do not, however, believe this should be limited to situations in which a release is being sought but should be part of an employer's affirmative obligations under the fair employment laws.

3. Defining "Bona Fide Claims

a) Charges filed with state agencies: The EEOC has suggested, and AARP agrees, that sec. 3 of the Act should be amended to recognize age discrimination charges filed with state agencies as satisfying the requirement for a "bona fide claim."

b) Objective Standard of Proof: The criteria set forth in sec. 3 should be the exclusive and objective test for determining whether a waiver was preceded by a "bona fide claim." It should be made clear, either through legislative history or by amendment to the Act, that the plaintiff (employee) is not required to prove that the plaintiff would have prevailed in court on the claim in order for it to be considered "bona fide" for purposes of this Act.

Finally, AARP strongly disagrees with the assumption made by some witnesses at the hearing that employers will cease offering, or will substantially limit the benefits offered in, enhanced benefit programs if waivers are not permitted as a condition of participation in these programs. Not only is there no evidence to support this assumption but, as GAO testified that day, the overwhelming majority of large employers surveyed by GAO have not requested ADEA waivers when implementing enhanced benefit termination programs. As noted by others who have studied early retirement and exit incentive programs, enhanced benefits are offered to maintain employee morale and ensure a smooth transition to a smaller workforce; waivers defeat this goal by raising questions in employees' minds as to the legality of corporate conduct.

AARP thanks you for this opportunity to submit this Statement and looks forward to working with your Committee to expedite passage of this important bill.

Very truly yours,

John Rother

John Rother
Director, Legislation, Research & Public Policy

Enc.

AARP

Statement of the
AMERICAN ASSOCIATION OF RETIRED PERSONS
on
UNSUPERVISED WAIVERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

before the

U.S. Senate Committee on Labor and Human Resources

Subcommittee on Labor

presented by

JUDITH BROWN

National Treasurer; Member, Board of Directors

May 24, 1988

For information call:

Michele Pollak - Federal Affairs Dept.
American Association of Retired Persons
1909 K St., N.W.
Washington, D.C. 20049
202/728-4729

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

Louise D. Crooks *President* Horace B. Deets *Executive Director*

MR. CHAIRMAN AND MEMBERS OF THIS COMMITTEE:

THANK YOU FOR THIS OPPORTUNITY TO DISCUSS AARP'S CONCERNS ABOUT THE E.E.O.C. RULE TO PERMIT UNSUPERVISED WAIVERS OF EMPLOYEES' A.D.E.A. RIGHTS.

ALMOST TEN MILLION OF AARP'S 29 MILLION MEMBERS ABOVE AGE 50 WORK FULL- OR PART-TIME. MORE THAN HALF ARE WOMEN; A SIGNIFICANT PERCENTAGE ARE MINORITIES. THE E.E.O.C.'S WAIVER RULE IS, UNFORTUNATELY, CONSISTENT WITH ITS POSITIONS ON EVERY SINGLE A.D.E.A. POLICY IN THE PAST THREE OR FOUR YEARS. THE E.E.O.C. HAS NOT ONLY FAILED TO ENFORCE THE LAW AND ITS OWN REGULATIONS, BUT HAS TAKEN STEPS TO DIMINISH THE RIGHTS OF OLDER WORKERS WITH REGARD TO PENSION BENEFITS, EXIT AND EARLY RETIREMENT INCENTIVES, APPRENTICESHIP PROGRAMS, ADVERSE IMPACT CASES AND PROCESSING OF CHARGES. THE E.E.O.C. HAS SHOWN A CLEAR BIAS IN FAVOR OF THE BUSINESS COMMUNITY ON MATTERS OF POLICY.

THE WAIVER RULE

THE E.E.O.C.'S "WAIVER RULE" WAS PROPOSED IN OCTOBER 1985 IN RESPONSE TO A FEDERAL COURT CASE, RUNYAN V. NCR. RUNYAN, AN EXPERIENCED LABOR LAWYER, ENTERED INTO A CONSULTING AGREEMENT WITH HIS EMPLOYER AFTER HE WAS TERMINATED FROM HIS FULL-TIME JOB. HE SIGNED A WAIVER OF ALL CLAIMS BUT, AFTER HIS CONSULTING AGREEMENT EXPIRED, SUED HIS EMPLOYER FOR AGE DISCRIMINATION IN CONNECTION WITH HIS TERMINATION. THE SIXTH CIRCUIT ULTIMATELY RULED THAT, UNDER THE CIRCUMSTANCES, THE WAIVER WAS VALID EVEN THOUGH IT WAS NOT SUPERVISED BY THE E.E.O.C.. THE COURT REFERRED TO THE E.E.O.C.'S PROPOSED RULE IN ITS DECISION - AS HAS EVERY

SINGLE COURT THAT HAS ADDRESSED THIS ISSUE.

THIS SINGLE, CLEARLY UNIQUE, CASE PROMPTED THE E.E.O.C. TO ISSUE A SWEEPING RULE PERMITTING ANY EMPLOYEE TO WAIVE HIS OR HER A.D.E.A. RIGHTS IN ALMOST ANY CIRCUMSTANCE.

AARP AND OTHERS, INCLUDING MANY MEMBERS OF CONGRESS, OBJECTED TO THE PROPOSED RULE. AARP ARGUED THAT:

- IT VIOLATED THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT INCORPORATED INTO THE A.D.E.A.;
- RELIANCE UPON TITLE VII PROCEDURES WAS MISPLACED;
- THE RIGHTS OF OLDER WORKERS WOULD BE SERIOUSLY JEOPARDIZED; AND
- THE E.E.O.C. CAN'T ISSUE BLANKET EXEMPTIONS FROM THE REQUIREMENTS OF THE A.D.E.A.

THESE ARGUMENTS WERE REJECTED BY THE E.E.O.C..

IF REINSTATED, THE RULE WILL NOT MAKE IT EASIER FOR OLDER WORKERS TO "NEGOTIATE" SEVERANCE AGREEMENTS WITH THEIR EMPLOYERS. EMPLOYEES AFFECTED BY LARGE-SCALE TERMINATIONS, LAYOFFS AND EXIT OR EARLY RETIREMENT INCENTIVE PROGRAMS DO NOT "NEGOTIATE" THE TERMS OF THEIR SEVERANCE OR THEIR WAIVER. THESE EMPLOYEES ARE NOT SETTLING A CHARGE OR CLAIM OR DISPUTE; THEY ARE WAIVING THEIR RIGHTS AT A TIME WHEN IT IS IMPOSSIBLE FOR THEM TO FULLY KNOW THE NATURE OR VALUE OF THE RIGHTS THEY ARE BEING ASKED TO GIVE UP.

THE E.E.O.C.'S RULE WILL NOT PROTECT EMPLOYEES; IT WILL PROTECT EMPLOYERS BY INSULATING THEM FROM LIABILITY WHEN THEY IMPLEMENT ENHANCED BENEFIT PROGRAMS IN AN ILLEGAL OR DISCRIMINATORY MANNER. SUCH A RULE OBVIOUSLY ENCOURAGES ILLEGAL

CONDUCT.

THE SUPREME COURT'S RULINGS ON F.L.S.A. WAIVERS AND INCORPORATION INTO THE A.D.E.A. HAVE BEEN LARGELY IGNORED BY THE E.E.O.C. AND HENCE BY THE LOWER COURTS, ALMOST ALL OF WHICH CITE THE E.E.O.C.'S RULE OR AN E.E.O.C. BRIEF IN THEIR OPINIONS. (NOT SURPRISINGLY, A FEDERAL AGENCY'S INTERPRETATION OF THE LAWS IT IS ENTRUSTED TO ENFORCE CARRIES GREAT WEIGHT WITH THE COURTS. NONETHELESS, THE LOWER COURT OPINIONS ON THIS ISSUE - INCLUDING RUNYAN - ARE FAR NARROWER IN ANALYSIS AND FACTS THAN THE BROAD E.E.O.C. FINAL RULE AND HENCE DO NOT SUPPORT THE RULE.)

THE SUPREME COURT MADE CLEAR IN LORILLARD v. PONS THAT THE F.L.S.A. SECTIONS CONGRESS CHOSE TO INCORPORATE INTO THE A.D.E.A. MUST BE GIVEN FULL FORCE AND EFFECT. IN BROOKLYN BANK v. O'NEILL, THE COURT HELD THAT UNSUPERVISED WAIVERS UNDER THIS F.L.S.A. SECTION ARE GENERALLY INVALID - ESPECIALLY WHEN NOT OBTAINED IN NEGOTIATED SETTLEMENT OF PENDING BONA FIDE FACTUAL DISPUTE. (EVEN RUNYAN, AND ALL THE CASES RELIED UPON BY THE E.E.O.C. TO SUPPORT ITS RULE, RECOGNIZED THIS DISTINCTION AND LIMITED THEIR HOLDINGS TO UNSUPERVISED WAIVERS OF BONA FIDE FACTUAL DISPUTES. THE E.E.O.C. RULE IS NOT SIMILARLY LIMITED.) THUS, THE DEPT. OF LABOR DOESN'T SUPERVISE WAIVERS UNDER THIS SAME SECTION EXCEPT WHEN SETTLING A FORMAL DISPUTE ALLEGING A VIOLATION OF THE F.L.S.A. IT DOESN'T CONSIDER ANY OTHER WAIVERS TO BE VALID. UNLIKE THE E.E.O.C., THE DEPT. OF LABOR ENCOURAGES EMPLOYERS OBEY THE LAW AS THEIR BEST PROTECTION AGAINST LAWSUITS.

THE E.E.O.C. SHOULD FOLLOW THE DEPT. OF LABOR'S PRACTICE.

BY PRESUMING THE INVALIDITY OF UNSUPERVISED WAIVERS, THE LAW DISCOURAGES EMPLOYERS FROM SEEKING WAIVERS IN NON-ADVERSARIAL CIRCUMSTANCES WHERE THERE IS NO PENDING AGE DISCRIMINATION DISPUTE, SUCH AS EXIT INCENTIVE PROGRAMS. SUPERVISION THAT WOULD MAKE SUCH WAIVERS TECHNICALLY LEGAL IS UNNECESSARY, UNDESIRABLE AND SUBVERTS THE INTENTION OF CONGRESS TO PROVIDE MAXIMUM PROTECTION TO EMPLOYEES FROM AGE-BASED EMPLOYMENT DISCRIMINATION.

THERE ARE MANY ADVANTAGES TO THIS. FIRST, IT INSURES THAT EMPLOYEES DO NOT SIGN AWAY THEIR RIGHTS AT A TIME WHEN THEY ARE UNABLE TO DETERMINE WHETHER THEY HAVE BEEN DISCRIMINATED AGAINST. WORKERS ARE ALSO PARTICULARLY SUSCEPTIBLE TO COERCION AT THIS TIME. THEY MUST FACE ISSUES SUCH AS GETTING ANOTHER JOB; TELLING THEIR FAMILIES THEY'RE OUT OF WORK; HOW TO PAY FOR THEIR CHILDREN'S EDUCATION, ETC. IT'S HARD TO TURN DOWN CASH WHEN YOU DON'T KNOW IF MORE WILL BE COMING IN.

SECOND, IT ENCOURAGES EMPLOYERS TO DEAL WITH EMPLOYEES IN A FAIR AND EVEN-HANDED MANNER AND TO STRUCTURE VOLUNTARY AND INVOLUNTARY SEVERANCE PROGRAMS IN A NON-DISCRIMINATORY MANNER.

THIRD, IT EVENS-UP THE RELATIVE POSITIONS OF WORKERS AND EMPLOYERS. THE E.E.O.C.'S RULE WOULD LET EMPLOYERS MAKE A UNILATERAL DECISION ABOUT THE VALUE OF AN EMPLOYEE'S RIGHTS AT A TIME WHEN AN EMPLOYEE HAS NO WAY OF ASSESSING THIS BECAUSE, IN REALITY, THE EMPLOYEE IS BEING ASKED TO WAIVE A PROSPECTIVE CLAIM. THIS IS UNPRECEDENTED.

THE FACT THAT UNSUPERVISED WAIVERS HAVE BECOME A TROUBLESOME ISSUE UNDER THE A.D.E.A., BUT NOT UNDER TITLE VII, HIGHLIGHTS THE

PROCEDURAL AND PRACTICAL DIFFERENCES BETWEEN THESE TWO LAWS. TITLE VII RIGHTS ARE RARELY IMPLICATED IN VOLUNTARY OR INVOLUNTARY ENHANCED SEVERANCE PROGRAMS; A.D.E.A. RIGHTS OFTEN ARE. TITLE VII WAIVERS ARE RARELY REQUESTED EXCEPT IN ADVERSARIAL CIRCUMSTANCES, WHERE A DISCRIMINATION CHARGE OR LAWSUIT IS BEING SETTLED; IN CONTRAST, A.D.E.A. WAIVERS ARE MOST FREQUENTLY REQUESTED IN CIRCUMSTANCES DEVOID OF A CHARGE OR PENDING DISPUTE REGARDING DISCRIMINATION. BECAUSE OF THE MAGNITUDE OF THESE SEVERANCE PROGRAMS, HUNDREDS OF THOUSANDS OF EMPLOYEES CAN BE ASKED TO WAIVE THEIR A.D.E.A. RIGHTS IN ADVANCE OF ANY POSSIBLE KNOWLEDGE OR EVIDENCE OF AGE DISCRIMINATION. THERE IS SIMPLY NO COROLLARY UNDER TITLE VII.
CONGRESS CLEARLY HAD GOOD REASONS FOR CHOOSING DIFFERENT ENFORCEMENT SCHEMES FOR THESE TWO LAWS.

THE RULE WILL ALSO SIGNIFICANTLY INCREASE PLAINTIFF'S PROCEDURAL OBSTACLES. THE A.D.E.A. PRESUMES THE INVALIDITY OF UNSUPERVISED WAIVERS; THE E.E.O.C.'S RULE TURNS THIS ON ITS HEAD. PLAINTIFFS AND CHARGING PARTIES WILL BE FORCED, FOR THE FIRST TIME, TO REBUT A PRESUMPTION OF VALIDITY BY PROVING THAT A WAIVER WAS "KNOWING AND VOLUNTARY" BEFORE THEY CAN ASSERT A VALID CLAIM. THIS IS AN ENORMOUS AND COSTLY BURDEN THAT MOST PLAINTIFFS CAN'T AFFORD EITHER FINANCIALLY OR EMOTIONALLY.

THE E.E.O.C. ARGUES THAT ITS RULE HAS A NUMBER OF PROTECTIONS AGAINST ABUSE OF UNSUPERVISED WAIVERS. THESE SO-CALLED "PROTECTIONS" ARE OF MINIMAL HELP. BECAUSE EVIDENCE OF AGE DISCRIMINATION IN LARGE SCALE TERMINATIONS IS OFTEN

UNAVAILABLE UNTIL LONG AFTER ANY INDIVIDUAL WAIVER IS SIGNED, IT IS IMPOSSIBLE FOR THE WAIVER TO BE TRULY "KNOWING AND VOLUNTARY." FURTHERMORE, FEW EMPLOYEES WILL HAVE REASON TO FILE A CHARGE WITH THE E.E.O.C. ONCE THEY HAVE SIGNED A WAIVER, ESPECIALLY SINCE IT IS UNCLEAR WHAT, IF ANY, ADMINISTRATIVE RELIEF THE E.E.O.C. COULD PURSUE ON THEIR BEHALF.

EMPLOYERS ARGUE THAT THEY WON'T OFFER THESE PROGRAMS - OR WILL OFFER LESS VALUABLE ONES - IF THEY CAN'T GET WAIVERS. THIS MAKES NO SENSE AND IS CONTRADICTED BY THE FACT THAT, AS YOU HAVE NOTED MR. CHAIRMAN, MANY LARGE COMPANIES OFFER ENHANCED SEVERANCE AND EARLY RETIREMENT PACKAGES WITHOUT REQUESTING WAIVERS. EMPLOYERS REALIZE SIGNIFICANT BENEFITS, INCLUDING GOOD PUBLIC RELATIONS AND INCREASED EMPLOYEE MORALE. MOST IMPORTANT, AN EMPLOYEE WHO LEAVES WITH AN ENHANCED BENEFIT PACKAGE IS LIKELY TO BE HAPPIER ABOUT LEAVING AND LESS LIKELY TO LITIGATE THAN ONE WHO IS SIMPLY TERMINATED. INDEED, THAT'S THE REAL REASON THESE PACKAGES EXIST. THIS WOULD ARGUE FOR GREATER, NOT LESS, BENEFITS IN THE ABSENCE OF WAIVERS.

VOLUNTARY AND INVOLUNTARY ENHANCED SEVERANCE PROGRAMS CAN OFFER SIGNIFICANT BENEFITS TO WORKERS AND EMPLOYERS. HOWEVER, LIKE EVERY EMPLOYMENT PRACTICE, THEY MUST BE CAREFULLY STRUCTURED AND SCRUTINIZED TO ENSURE THAT THEY DO NOT DISCRIMINATE. AND, SINCE ONE OF THE PURPOSES OF THE A.D.E.A. IS TO "ENCOURAGE THE EMPLOYMENT OF OLDER AMERICANS," WE MUST EXPRESS CONCERN AND SKEPTICISM ABOUT THOSE PROGRAMS THAT ASSUME OLDER WORKERS ARE THE MOST EXPENDABLE. PROGRAMS NOT TARGETED OR

RESTRICTED BY AGE CAN JUST AS EASILY ACCOMPLISH AN EMPLOYERS' GOALS.

THE A.D.E.A.'S PROHIBITION AGAINST UNSUPERVISED WAIVERS IS NOT DESIGNED TO ASSIST THE FEW EMPLOYEES WHO ACTUALLY CAN NEGOTIATE THE TERMS OF THEIR SEVERANCE FROM THEIR EMPLOYER. THESE PERSONS ARE UNLIKELY TO SUE. IT IS THE MANY THOUSANDS OF EMPLOYEES WHO ARE UNABLE TO NEGOTIATE AND ARE UNAWARE UNTIL MUCH LATER THAT THEY WERE DISCRIMINATED AGAINST THAT THE LAW PROTECTS - AND THAT THE E.E.O.C.'S WAIVER RULE IGNORES.

I STRONGLY URGE YOU TO RETAIN THE CONGRESSIONAL SUSPENSION OF THE E.E.O.C.'S WAIVER RULE.

Senator **Jeffords**. The hearing is now adjourned.

[Whereupon, at 1 p.m., the subcommittee adjourned subject to the call of the Chair.]

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